ALLAN BRYAN

v.

JUDITH ANNE MALONEY

HIGH COURT, AUSTRALIA
MASON CJ, BRENNAN, DEANE, TOOHEY & GAUDRON JJ
[F.C. 95/011]
23 MARCH 1995

***TORT**: Negligence - Duty of care - Whether sufficient proximity exists - Whether negligent builder liable for damage to house suffered by subsequent purchaser - Absence of contractual relationship - Whether liability excluded by public policy.*

***TORT**: Negligence - Loss sustained by subsequent purchaser by reason of negligent building works - Costs of remedying defects - Whether pure economic loss or loss arising from defects - Quantum of damages - Diminution in value of the house.*

***TORT**: Negligence - Pure economic loss - Meaning of - Whether pyhsical defects in building can be pure economic loss.*

The appellant, Bryan, a professional builder, built a house for one Mrs. Manion on her land in 1979. One Mr. and Mrs. Quittenden bought the land and the house from her and in 1986, they sold it to the respondent Mrs. Maloney. The respondent inspected the house three times before purchasing it but noticed no cracks or defects. About six months after the purchase, cracks began to appear on the walls of the house and there was extensive damage to the fabric of the house. The reason for the cracks and subsequent damage was that the appellant had built the house with footings inadequate to withstand the seasonal changes in the clay soil. The respondent then sued the apppellant for negligence and the trial Judge awarded damages of $34,464.68, which would necessarily be expended in remedying the inadequate footings and consequential damage to the fabric of the house. The appellant's appeal to the Full Court of the Supreme Court of Tasmania was unanimously dismissed. The appellant then made the present appeal to the High Court of Australia.

It was common ground for the purpose of the appeal that (i) the appellant was negligent in building the house with inadequate footings; (ii) damage sustained by the respondent was the loss involved in the decrease in the value of the house resulting from the inadequacy of the footings and its consequences; (iii) the damage was sustained by the respondent when the inadequacy of the footings first became manifest by reason of the cracks appearing in the walls of the house after she had purchased it; (iv) that damage was a foreseeable consequence of the appellant's negligence; and (v) the economic loss involved is the amount which would necessarily be expended in remedying the inadequate footings and their consequences as assessed by the trial Judge. The sole issue to be decided was, whether under the law of negligence, a professional builder who constructs a house for the then owner of the land owes a *prima facie* duty to a subsequent owner of the house to exercise reasonable care to avoid the kind of foreseeable damage which the respondent sustained in the present case i.e. a dimunition in the value of the house when a latent and previously unknown defect in its footings or structure first becomes manifest.

Held:

Per Mason CJ, Deane and Gaudron JJ:

[1] A clear relationship of proximity existed between the appellant and the first owner with respect to ordinary physical injury to her or her property and the appellant was under a

duty to exercise reasonable care in the building work to avoid a foreseeable risk of such injury. That relationship of proximity and consequent duty of care extended to mere economic loss sustained by the first owner when the inadequacy of the footings became manifest.

[2] In considering the proximity between the appellant and the respondent, it must be determined whether the relationship which exists between a professional builder of a house, such as the appellant, and a subsequent owner, such as the respondent, possesses the requisite degree of proximity to give rise to a duty to take reasonable care on the part of the builder to avoid the kind of economic loss sustained by the respondent in the present case. The only connection will be the house itself, which is a permanent structure to be used indefinitely and a significant investment for a subsequent owner. It is obviously foreseeable by such a builder that the negligent construction of the house with inadequaate footings is likely to cause economic loss to the owner of the house at the time when the inadequacy of the footings first becomes manifest.

[3] The policy consideration underlying the reluctance of the Court to recognise a relationship of proximity and a consequential duty of care in cases of mere economic loss are largely inapplicable to the relationship between a builder and a subsequent owner as regards this particular kind of economic loss i.e. the dimunition in value of a house when the inadequacy of its footings first becomes manifest by reason of consequent damage to the fabric of the house.

[4] In all the circumstances, the relationship between the builder and subsequent owner as regards the particular kind of economic loss should be accepted as possessing a comparable degree of proximity to that possessed by the relationship between builder and first owner and as giving rise to a duty to take reasonable care on the part of the builder to avoid such loss.

Per Toohey J:

[1] The existence of the contract between the appellant and the first owner is of itself no barrier to an action in tort by the respondent based upon failure to build according to reasonable standards though the duty of care must not depend on specific obligations arising from the express terms of the contract.

[2] Liability of the appellant to the respondent depends on the relationship of proximity although there was no direct association between the parties. The importance of a house to any buyer is something well recognised and understood by a builder. There is a very direct relationship between the negligence of the appellant and the loss suffered by the respondent. It was only a matter of timing that cracks in the wall appeared while the respondent was owner rather than the first owner. Therefore, there is sufficient proximity between the parties to render the appellant liable to the respondent.

Per Brennan J (dissenting):

[1] Although it was conceded on appeal that the damage sustained by the respondent was pure economic loss, it means economic loss that is not consequent on physical damage to a person or to property. The respondent's damage consisted of defects in her house and the measure of damages awarded for those defects was the cost of their rectification. It is artificial to classify defects in a building as pure economic loss. Defects in a building are physical defects and the cost of their rectification is consequential on their existence. The defects are not physical damage the foreseeability of which gives rise to a *prima facie* duty of care, but it does not follow that the cost of rectifying such physical defects in order to

improve the quality of the building is pure economic loss which may attract an award of damages for negligence. The damages awarded to the respondent was not for pure economic loss.

[2] The questions should be differently framed as follows i.e. what damage did the respondent suffer and, given foreseeability, was the appellant under a duty to use reasonable care to prevent or avoid that kind of damage? The answer to the first question is that physical defects in the house which she bought are the only items of damage advanced in support of the respondent's claim and as they posed no substantial risk of damage to person or to property, she suffered no damage in respect of which an action lies in negligence. The answer to the second question is: no.

[Appeal dismissed].

Cases referred to:

Sutherland Shire Council v. Heyman [1985] 157 CLR 424 ***(refd)***
D & F. Estates Ltd. v. Church Commissioners [1989] AC 177 ***(refd)***
Murphy v. Brentwood District Council [1991] 1 AC 398 ***(refd)***
Department of the Environment v. T. Bates Ltd. [1991] 1 AC 499 ***(refd)***
Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad" [1976] 136 CLR 529 ***(refd)***
Jaensch v. Coffey [1984] 155 CLR 549 ***(refd)***
San Sebastian Pty. Ltd. v. The Minister [1986] 162 CLR 340 ***(refd)***
Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465 ***(refd)***
Dorset Yacht Co. v. Home Office [1970] AC 1004 ***(refd)***
Ultramares Corporation v. Touche [1931] 174 NE 441 ***(refd)***
Hawkins v. Clayton [1988] 164 CLR 539 ***(refd)***
Burnie Port Authority v. General Jones Pty. Ltd. [1994] 179 CLR 520 ***(refd)***
Stevens v. Brodribb Sawmilling Co. Pty. Ltd. [1986] 160 CLR 16 ***(refd)***
Midland Bank v. Hett, Stubbs & Kemp [1979] Ch 384 ***(refd)***
Central Trust Co. v. Rafuse [1986] 31 DLR (4th) 481 ***(refd)***
National Mutual Life Association of Australasia Ltd. v. Coffey & Partners Pty. Ltd. [1991] 2 Qd R 401 ***(refd)***
Opat v. National Mutual Life [1992] 1 VR 283 ***(refd)***
Lowden v. Lewis [1989] Tas R 254 ***(refd)***
Brumby v. Pearton [1991] 10 BCL 291 ***(refd)***
Dutton v. Jalapen Pty. Ltd. (unreported, Supreme Court of Queensland, 14 March 1991) ***(refd)***
Miell v. Hatjopoulos [1987] 4 BCL 226 ***(refd)***
Bowen v. Paramount Builders [1977] 1 NZLR 394 ***(refd)***
Voli v. Inglewood Shire Council [1963] 110 CLR 74 ***(refd)***
Winnipeg Condominium Corp. No. 36 v. Bird Construction Co. Ltd. (unreported, Supreme Court of Canada, 26 January 1995) ***(refd)***
Donoghue v. Stevenson [1932] AC 610 ***(refd)***
Anns v. Merton London Borough Council [1978] AC 759 ***(refd)***
Murphy v. Brentwood District Council [1991] 1 AC 470 ***(refd)***
Benning v. Wong [1969] 122 CLR 249 ***(refd)***
AC Billings & Sons Ltd. v. Riden [1958] AC 240 ***(refd)***
Gallagher v. N. McDowell Ltd. [1961] NI 26 ***(refd)***
Clay v. AJ Crump & Sons Ltd. [1964] 1 QB 533 ***(refd)***
Sharpe v. ET Sweeting & Son Ltd. [1963] 1 WLR 665 ***(refd)***
Rimmer v. Liverpool City Council [1984] 1 All ER 930 ***(refd)***
Pantalone v. Alaouie [1989] 18 NSWLR 119 ***(refd)***
Askin v. Knox [1989] 1 NZLR 248 ***(refd)***
Lempke v. Dagenais [1988] 547 A 2d 290 ***(refd)***
Dutton v. Bognor Regis Urban District Council [1972] 1 QB 373 ***(refd)***
Coburn v. Lenox Homes Inc. [1977] 378 A 2d 599 ***(refd)***

Brown v. Fowler [1979] 279 NW 2d 907 ***(refd)***
Terlinde v. Neely [1980] 271 SE 2d 768 ***(refd)***
Drexel Properties Inc. v. Bay Colony [1981] 406 So 2d 515 ***(refd)***
Cosmopolitan Homes Inc. v. Weller [1983] 663 P 2d 1041 ***(refd)***
McMillan v. Brune-Harpenau-Torbeck Builders [1983] 455 NE 2d 1276 ***(refd)***
Huang v. Garner [1984] 203 Cal Rptr 800 ***(refd)***
Barnes v. Mac Brown and Company Inc. [1976] 342 NE 2d 619 ***(refd)***
Moxley v. Laramie Builders Inc. [1979] 600 P 2d 733 ***(refd)***
Blagg v. Fred Hunt Co. Inc. [1981] 612 SW 2d 321 ***(refd)***
Redarowicz v. Ohlendorf [1982] 441 NE 2d 324 ***(refd)***
Gupta v. Ritter Homes Inc. [1983] 646 SW 2d 168 ***(refd)***
Rivtow Marine Ltd. v. Washington Iron Works [1973] 40 DLR (3d) 530 ***(refd)***
Overseas Tankship (UK) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound (No. 1)) [1971] AC 388 ***(refd)***
Gala v. Preston [1991] 172 CLR 243 ***(refd)***
Vaughan v. Webb [1902] 2 SR (NSW) 293 ***(refd)***
Leigh & Sillavan Ltd. v. Aliakmon Ltd. [1986] AC 785 ***(refd)***
Dutton v. Bognor Regis Urban District Council [1972] 1 QB 373 ***(refd)***
Junior Books Ltd. v. Veitchi Ltd. [1983] 1 AC 520 ***(refd)***
Nitrigin Eireann Teoranta v. Inco Alloys Ltd. [1992] 1 WLR 498 at 504; [1922] 1 All ER 854 ***(refd)***
Simaan Contracting Co. v. Pilkington Ltd. (No. 2) [1988] QB 758 ***(refd)***
East River Steamship Corp. v. Transamerica Delaval Inc. [1986] 476 US 858 ***(refd)***
Tai Hing Ltd. v. Liu Chong Hing Bank [1986] AC 80 ***(refd)***
Mutual Life & Citizen's Assurance Co. Ltd. v. Evatt [1968] 122 CLR 556 (HC)[1971] AC 793 (PC) ***(refd)***
Shaddock & Associates Pty. Ltd. v. Parramatta City Council (No. 1) [1981] 150 CLR 225 ***(refd)***
*City of Kamloops v. Neilsen [1984] 10 DLR (4th) 641****(refd)***
Canadian National Railway Co. v. Norsk Pacific Steamship Co. [1992] 91 DLR (4th) 289 ***(refd)***
Sedleigh-Denfield v. O'Callaghan [1940] AC 880 ***(refd)***
Overseas Tankship (UK) Ltd. v. The Miller Steamship Co. Pty. (The Wagon Mound (No. 2)) [1967] 1 AC 617 ***(refd)***
Cartwright v. McLaine & Long Pty. Ltd. [1979] 143 CLR 549 ***(refd)***
Montana Hotels v. Fasson [1986] 69 ALR 258 ***(refd)***
Council of Co-owners v. Whiting-Turner [1986] 517 A 2d 336 ***(refd)***
Oates v. Jag. Inc. [1985] 333 SE 2d 222 ***(refd)***
Richards v. Powercraft Homes, Inc. [1984] 678 P 2d 427 ***(refd)***
Cook v. Cook [1986] 16 2 CLR 376 ***(refd)***
Christopher v. The Motor Vessel "Fiji Gas" [1993] Aust Torts Rep 81 - 202 ***(refd)***
Cattle v. Stockton Waterworks Co. [1875] LR 10 QB 453 ***(refd)***

Other sources referred to:

"An Impossible Distinction", Sir Robin Cooke, [1991] 107 Law Quarterly Review 46 at 61-63
"Tort in a Contractual Matrix", Fleming , [1993] 5, Canterbury Law Review 269
"Are We up to Expectations? Solicitors, Beneficiaries and the Tort/Contract Divide", Barker [1994] 14, Oxford Journal of Legal Studies 137 at 147
"An Impossible Distinction", Sir Robin Cooke [1991] 107 Law Quarterly Review 46.
"Negligence and Defective Buildings: Confusion Confounded?", Duncan Wallace, [1989] 105 Law Quarterly Review 46 at 57
"The Random Element of Their Lordships' Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from Anns to Murphy", Markesinis and Deakin, [1992] 55 Modern Law Review 619

For the appellant - Sly & Weigall
For the respondent - Zeeman Kable & Page

JUDGMENT

Mason CJ, Deane & Gaudron JJ:

The appellant, Mr Bryan, is a professional builder. In 1979, he built a house for a Mrs Manion on land in Launceston which Mrs Manion owned. Subsequently, Mrs Manion sold the land and the house to a Mr and Mrs Quittenden. In 1986, Mr and Mrs Quittenden sold the land and house to the respondent, Mrs Maloney.

Mrs Maloney inspected the house three times before purchasing it. She noticed no cracks or other defects. She said that she specifically looked for cracks on the outside walls and found none. Apparently, she neither knew nor inquired about the identity of the builder. Her evidence was that the house suited her needs, that she thought "it was a good solid house", that she "couldn't find anything wrong with it" and that she "thought it would be built properly ... so I bought it". About six months after the purchase, cracks began to appear in the walls of the house. The damage to the fabric of the house became extensive. The reason for the cracks and subsequent damage was that the house had been built by Mr Bryan with footings which were inadequate to withstand the seasonal changes in the clay soil.

Mrs Maloney instituted proceedings in negligence against Mr Bryan in the Supreme Court of Tasmania. The learned trial Judge (Wright J) found in Mrs Maloney's favour and awarded damages of $34,464.68, that being the amount which his Honour found would necessarily be expended in remedying the inadequate footings and the consequential damage to the fabric of the house. Mr Bryan appealed to the Full Court of the Supreme Court of Tasmania. His appeal was unanimously dismissed. He now appeals to this Court from the judgment and order of the Full Court. It is appropriate at the outset to acknowledge the assistance we have received from the carefully researched and reasoned judgments of the trial Judge and of Underwood J and of Crawford J (with whom Cox J agreed) in the Full Court.

Both in this Court and in the Full Court, the case has been argued on the basis that, in accordance with the findings and conclusions of the trial Judge, a number of matters are now common ground, namely, that Mr Bryan was negligent in building the house with inadequate footings; that the damage sustained by Mrs Maloney was the loss involved in the decrease in the value of the house resulting from the inadequacy of the footings and its consequences; that damage was sustained by Mrs Maloney when the inadequacy of the footings first became manifest by reason of the cracks appearing in the walls of the house after she had purchased it; and, that damage was a foreseeable consequence of Mr Bryan's negligence. Moreover, it is not in issue that, in the circumstances of this case, the economic loss involved is the amount which would necessarily be expended in remedying the inadequate footing and their consequences as assessed by the trial Judge. In the result, the sole remaining issue is whether Mr Bryan owed Mrs Maloney, as a subsequent purchaser of the house, a relevant duty of care under the law of negligence.

The evidence disclosed that Mrs Manion, for whom the house was originally built on what was described in argument as a "cost plus a margin (of profit)" basis, was Mr Bryan's sister-in-law. It is not, however, suggested that the relationship between them was other than an ordinary business relationship between a professional builder and his client or that the contract between them contained any relevant exclusion or limitation of liability. Nor is it now argued that there was any competing or intervening negligence by any other person or entity such as an architect or the local council. That being so, the case falls to be decided on the basis that it gives rise to a question which can be stated in abstract terms, namely, whether, under the law of negligence, a professional builder who constructs a house for the then owner of

the land owes a *prima facie* duty to a subsequent owner of the house to exercise reasonable care to avoid the kind of foreseeable damage which Mrs Maloney sustained in the present case, that is to say, the diminution in value of the house when a latent and previously unknown defect in its footings or structure first becomes manifest. As the trial Judge recognized, that damage, which was the only damage sustained by Mrs Maloney, was mere economic loss in the sense that it was distinct from, and not consequent upon, ordinary physical injury to person or property see *Sutherland Shire Council v. Heyman* [1985] 157 CLR 424 at 503-505; *D & F. Estates Ltd. v. Church Commissioners* [1989] AC 177 at 206, 213, 216; *Murphy v. Brentwood District Council* [1991] 1 AC 398 at 466-468, 475, 484-485, 492-493; *Department of the Environment v. T. Bates Ltd.* [1991] 1 AC 499 at 519. In that regard, damage to the fabric of the house could not properly be treated as ordinary physical injury to property by reference to a "complex structure theory" of the kind adverted to by Lord Bridge of Harwich in *D. & F. Estates Ltd. v. Church Commissioners* [1989] AC at 207. At least in a case such as the present where the whole building has been erected by the one builder, "the complex structure theory offers no escape from the conclusion that damage to a house itself which is attributable to a defect in the structure of the house ... represents purely economic loss" *Murphy v. Brentwood District Council* [1911] 1 AC at 479 per Lord Bridge of Harwich; and see also at 470, 484, 497; *Sutherland Shire Council Heyman* [1985] 157 CLR at 512.

The cases in this Court establish that a duty of care arises under the common law of negligence of this country only where there exists a relationship of proximity between the parties with respect to both the relevant class of act or omission and the relevant kind of damage. In more settled areas of the law of negligence concerned with ordinary physical injury to the person or property of a plaintiff caused by some act of the defendant, reasonable foreseeability of such injury will commonly suffice to establish that the facts fall into a category which has already been recognized as involving a relationship of proximity between the parties with respect to such an act and such damage and as "attracting a duty of care, the scope of which is settled" *Sutherland Shire Council v. Heyman* [1985] 157 CLR at 441 per Gibbs CJ and see also at 495, 501; *Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad"* [1976] 136 CLR 529 at 572-574; *Jaensch v. Coffey* [1984] 155 CLR 549 at 581-582. In contrast, the field of liability for mere economic loss is a comparatively new and developing area of the law of negligence. In that area, the question whether the requisite relationship of proximity exists in a particular category of case is more likely to be unresolved by previous binding authority with the consequences that the "notion of proximity ... is of vital importance" *San Sebastian Pty. Ltd. v. The Minister* [1986] 162 CLR 340 at 355 per Gibbs CJ, Mason, Wilson and Dawson JJ. As Stephen J indicated in Caltex *Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad"* [1976] 136 CLR at 575, it is the "articulation", in the different categories of case, "of circumstances which denote sufficient proximity" with respect to mere economic loss, including "policy considerations", which will gradually provide "a body of precedent productive of the necessary certainty". Inevitably, the policy considerations which are legitimately taken into account in determining whether sufficient proximity exists in a novel category will be influenced by the Courts' assessment of community standards and demands see, e.g., *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465 at 536; *Dorset Yacht Co. v. Home Office* [1970] AC 1004 at 1038-1039, 1058; *Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad"* [1976] 136 CLR at 575; *Sutherland Shire Council v. Heyman* [1985] 157 CLR at 497.

One policy consideration which may militate against recognition of a relationship of proximity in a category of case involving mere economic loss is the law's concern to avoid the imposition of liability "in an indeterminate amount for an indeterminate time to an indeterminate class" *Ultramares Corporation v. Touche* [1931] 174 NE 441 at 444 per Cardozo CJ; *Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad"* [1976] 136 CLR at 568, 591; *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC at 537; and see also *Sutherland Shire Council v. Heyman* [1985] 157 CLR at 465. Another consideration is the perception that, in a competitive world where one person's gain is commonly another's loss, a duty to take reasonable care to avoid causing mere economic loss to another, as distinct from physical injury to another's person or property, may be inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage *Jaensch v. Coffey* [1984] 155 CLR at 578; *Sutherland Shire Council v. Heyman* [1985] 157 CLR at 503. The combined effect of those two distinct policy considerations is that the categories of case in which the requisite relationship of proximity with respect to mere economic loss is to be found are properly to be seen as special. Commonly, but not necessarily, they will involve an identified element of known reliance (or dependence) or the assumption of responsibility or a combination of the two see, generally, *Sutherland Shire Council v. Heyman* [1985] 157 CLR at 466-468, 501-502; *Hawkins v. Clayton* [1988] 164 CLR 539 at 545, 576, 593.

As was pointed out in the recent majority judgment in *Burnie Port Authority v. General Jones Pty. Ltd.* [1994] 179 CLR 520 at 543 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; and see also *Stevens v. Brodribb Sawmilling Co. Pty. Ltd.* [1986] 160 CLR 16 at 53, the overriding requirement of a relationship of proximity represents the conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognizes the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another. There is no decision of the Court which directly determines the question whether the relationship between Mr Bryan, as the builder of the house, and Mrs Maloney, as a subsequent owner of it, possessed the requisite degree of proximity to give rise to a duty, on the part of Mr Bryan, to take reasonable care to avoid the kind of economic loss sustained by Mrs Maloney. Necessarily, as has been indicated, the resolution of that question requires the articulation of both the factual components of the relevant category of relationship and the identification of any applicable policy considerations. Ultimately, however, it is a question of law which must be resolved by the ordinary processes of legal reasoning in the context of the existence or absence of the requisite element of proximity in comparable relationships or with respect to comparable acts and/or damage. Accordingly, it is appropriate to approach the question through a consideration of some related situations.

Mr Bryan and Mrs Manion were the parties to a contract in relation to the building of the house. Whatever may have been the position in earlier times see, generally, *Midland Bank v. Hett, Stubbs & Kemp* [1979] Ch 384 at 405-411; *Central Trust Co. v. Rafuse* [1986] 31 DLR (4th) 481 at 489-499; *Hawkins v. Clayton* [1988] 164 CLR at 574-575, the existence of such a contractual relationship between builder and client did not preclude the existence either of a relationship of proximity between them in relation to that work or of a consequent duty of care under the ordinary law of negligence see, e.g., *National Mutual Life Association of Australasia Ltd. v. Coffey & Partners Pty. Ltd.* [1991] 2 Qd R 401 at 406; *Opat v. National Mutual Life* [1992] 1 VR 283 at 291-295; *Lowden v. Lewis* [1989] Tas R 254 at 266-267; *Brumby v. Pearton* [1991] 10 BCL 291 at 294-295 (Supreme Court of Tasmania); *Dutton v. Jalapen Pty. Ltd.* (unreported, Supreme Court of Queensland, 14 March 1991); *Miell v. Hatjopoulos* [1987] 4 BCL 226 (Supreme Court of South Australia); *Bowen v. Paramount Builders* [1977]

1 NZLR 394. That was made clear by Windeyer J, with the concurrence of the other members of the Court (Dixon CJ and Owen J), in *Voli v. Inglewood Shire Council* [1963] 110 CLR 74 at 84 when explaining the liabilities of an architect to his or her client:

> He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainments. But he must bring to the task he undertakes the competence and skill that is usual among architects practising their profession. And he must use due care. If he fails in these matters and the person who employed him thereby suffers damage, he is liable to that person. This liability can be said to arise either from a breach of his contract or in tort.

Subsequently, when dealing with the question of liability to a third party, Windeyer J commented *ibid*:

> Whatever might have been thought to be the position before the broad principles of the law of negligence were stated in modern form in *Donoghue v. Stevenson* [1932] AC 562, it is now beyond doubt that, for the reasonably foreseeable consequence of careless or unskillful conduct, an architect is liable to anyone whom it could reasonably have been expected might be injured as a result of his negligence. To such a person he owes a duty of care quite independently of his contract of employment.

Those passages were quoted by Deane J in *Hawkins v. Clayton* [1988] 164 CLR at 575, in a part of his judgment with which Mason CJ and Wilson J expressed their agreement *ibid.* at 543, as support for the proposition that there are no acceptable grounds for refusing to recognize the liability of a solicitor in tort for negligence in the performance of professional work for a client. As Windeyer J himself recognized in *Voli v. Inglewood Shire Council* [1963] 110 CLR at 84, they are applicable to define "the ordinary liabilities of any man who follows a skilled calling".

The fact that the law recognizes the existence of concurrent duties in contract and tort does not mean that the existence of a contractual relationship is irrelevant to either the existence of a relationship of proximity or the content of a duty of care under the ordinary law of negligence. In some circumstances, the existence of a contract will provide the occasion for, and constitute a factor favouring the recognition of, a relationship of proximity either between the parties to the contract or between one or both of those parties and a third person. In other circumstances, the contents of a contract may militate against recognition of a relationship of proximity under the ordinary law of negligence or confine, or even exclude the existence of, a relevant duty of care. The position in those regards was helpfully and correctly explained in the following extracts from the judgment of Le Dain J, speaking for a unanimous Supreme Court of Canada, in *Central Trust Co. v. Rafuse* [1986] 31 DLR (4th) at 521-522. And see *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co. Ltd.* (unreported, Supreme Court of Canada, 26 January 1995):

> 1. The common law duty of care that is created by a relationship of sufficient proximity ... is not confined to relationships that arise apart from contract. Although the relationships in *Donoghue v. Stevenson, Hedley Byrne and Anns v. Merton London Borough Council* [1978] AC 728 were all of a noncontractual nature and there was necessarily reference in the judgments to a duty of care that exists apart from or independently of contract, I find nothing in the statements of general principle in those cases to suggest that the principle was intended to be confined to relationships that arise apart from contract. Indeed, the *dictum* of Lord Macmillan in *Donoghue v. Stevenson* concerning concurrent liability ... would clearly suggest the contrary ... *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 AC 520, in which an owner sued flooring subcontractors directly in tort, is authority for the proposition that a common law duty of care may be created by a relationship of proximity that would not have arisen but for a contract.

> 2. What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. The distinction, in so far as the terms of the contract are concerned, is, broadly speaking, between what is to be done and how it is to be done. A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract. Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from contractual intention which should preclude reliance on a concurrent or alternative liability in tort. The same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the express terms of a contract.
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> 3. A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence.

The *dictum* of Lord Macmillan in *Donoghue v. Stevenson* to which Le Dain J referred in the first paragraph of the above extract reads as follows [1932] AC at 610:

> The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract, does not exclude the co-existence of a right of action founded on negligence as between the same parties, independently of the contract, though arising out of the relationship in fact brought about by the contract. Of this the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying him.

Lord Macmillan went on to add *ibid*:

> And there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort.

It follows that, in the circumstances of this case where the contract between Mr Bryan and Mrs Manion was non-detailed and contained no exclusion or limitation of liability, neither the existence nor the content of the contract precluded the existence of liability to Mrs Manion or Mrs Maloney under the ordinary law of negligence. To the contrary, the case was of the kind referred to by Le Dain J at the end of the first paragraph of the above extract, namely, a case where the relationship of proximity arises by virtue of the contract and the work to be performed under it.

Clearly enough, a relationship of proximity existed between Mr Bryan and Mrs Manion with respect to ordinary physical injury to Mrs Manion or her property with the consequence that Mr Bryan was under a duty to exercise reasonable care in relation to the building work, including the footings, to avoid a foreseeable risk of such injury. A more difficult question is whether that relationship of proximity and consequent duty of care with respect to the building work extended to mere economic loss by Mrs Manion of the kind ultimately sustained by Mrs Maloney when the inadequacy of the footings became manifest. In our view, it did.

While the relationship between Mr Bryan and Mrs Manion with respect to physical injury to Mrs Manion's person or property must be distinguished from the relationship between them with respect to mere economic loss, the significance of such a distinction varies

according to the particular kind of economic loss which is involved in the relevant category of case. Here, the distinction is between ordinary physical damage to a house by some external cause and mere economic loss in the form of diminution in value of a house when the inadequacy of its footings first becomes manifest by consequent damage to its fabric. Obviously, that distinction, which has only recently attained general acceptance cf. Lord Wilberforce's comment in *Anns v. Merton London Borough Council* [1978] AC at 759 to the effect that the correct classification of the damage in a case such as the present was not economic loss but "material, physical damage", is an essentially technical one. Indeed, even now, it is arguably inapplicable in circumstances where a latent defect in the work of one builder or contractor cause damage to a part of the building construed by a different builder or contractor see *Murphy v. Brentwood District Council* [1991] 1 AC at 470, 497.

Moreover, the policy considerations underlying the reluctance of the Courts to recognize a relationship of proximity and a consequent duty of care in cases of mere economic loss are inapplicable to a relationship of the kind which existed between Mr Bryan and Mrs Manion as regards the kind of economic loss sustained by Mrs Maloney. Thus, there is no basis for thinking that recognition of a relationship of proximity between builder and first owner with respect to that particular kind of economic loss would give rise to the type of liability "in an indeterminate amount for an indeterminate time to an indeterminate class" which the Courts are reluctant to recognize. Again, in circumstances where the builder is, in any event, under a duty of care to the first owner to avoid physical injury to that owner's person or property by reason of inadequacy of the footings, there can be no real question of inconsistency between the existence of a relationship of proximity with respect to that particular kind of economic loss and the legitimate pursuit by the builder of his or her own financial interests. Nor, as has been seen, is it legitimate to assert that, as a matter of policy, the sanctity of contract or the compartmentalization of the law dictates that liability under the ordinary principles of negligence in respect of either damages generally or a particular kind of damage must be excluded as between parties in a contractual relationship notwithstanding the absence of any actual agreement between the parties to that effect. Whatever may have been or may be the position in other times or in other places, the law of this country knows no such policy.

On the other hand, there are strong reasons for acknowledging the existence of a relevant relationship of proximity between a builder such as Mr Bryan and a first owner such as Mrs Manion with respect to the kind of economic loss sustained by Mrs Maloney. In particular, the ordinary relationship between a builder of a house and the first owner with respect to that kind of economic loss is characterized by the kind of assumption of responsibility on the one part (i.e., the builder) and known reliance on the other (i.e., the building owner) which commonly exists in the special categories of case in which a relationship of proximity and a consequent duty of care exists in respect of pure economic loss. There is nothing to suggest that the relationship between Mr Bryan and Mrs Manion was not characterized by such an assumption of responsibility and such reliance.

At least *prima facie*, a relationship of proximity also existed between Mr Bryan and persons other than Mrs Manion, including Mrs Maloney, who might sustain physical injury to person or property as a consequence of a collapse, as a result of inadequate footings, of part of the house while they or their property were lawfully in the house or in its vicinity the qualification "lawfully" is added merely for greater caution; cf. *Benning v. Wong* [1969] 122 CLR 249 at 320; *Burnie Port Authority v. General Jones* [1994] 179 CLR 546. The relationship between Mr Bryan and such persons corresponded with the relationship between the architect and the injured plaintiff in *Voli v. Inglewood Shire Council* [1963] 110 CLR 74. And see also

Hawkins v. Clayton [1988] 164 CLR at 578; *AC Billings & Sons Ltd. v. Riden* [1958] AC 240; *Gallagher v. N. McDowell Ltd.* [1961] NI 26; *Clay v. AJ Crump & Sons Ltd.* [1964] 1 QB 533; *Sharpe v. ET Sweeting & Son Ltd.* [1963] 1 WLR 665; *Rimmer v. Liverpool City Council* [1984] 1 All ER 930; *Pantalone v. Alaouie* [1989] 18 NSWLR 119; *Murphy v. Brentwood District Council* [1991] 1 AC at 475; *Department of the Environment v. T. Bates Ltd.* [1991] 1 AC 519. It is unnecessary, for the purposes of the present case, to consider whether such a relationship of proximity or any consequent duty of care can be excluded or modified by the terms of the contract between the builder and the first owner. As has been mentioned, it is not suggested that there was any special feature of the contract or agreement between Mr Bryan and Mrs Manion that had that effect in the present case. There is, however, obvious force in the conclusion expressed by Windeyer J in *Voli v. Inglewood Shire Council* [1963] 110 CLR at 85. And see also *Bowen v. Paramount Builders* [1977] 1 NZLR at 407 to the effect that, while such a contractual exclusion would be relevant to identifying the task upon which the architect had entered, it could not directly operate to discharge the architect from a duty of care which would otherwise exist "to persons who are strangers" to the contract.

It is in the context of the above-mentioned relationships of proximity that one must determine whether the relationship which exists between a professional builder of a house, such as Mr Bryan, and a subsequent owner, such as Mrs Maloney, possesses the requisite degree of proximity to give rise to a duty to take reasonable care on the part of the builder to avoid the kind of economic loss sustained by Mrs Maloney in the present case. It is likely that the only connection between such a builder and such a subsequent owner will be the house itself. Nonetheless, the relationship between them is marked by proximity in a number of important respects. The connecting link of the house is itself a substantial one. It is a permanent structure to be used indefinitely and, in this country, is likely to represent one of the most significant, and possibly *the* most significant, investment which the subsequent owner will make during his or her lifetime. It is obviously foreseeable by such a builder that the negligent construction of the house with inadequate footings is likely to cause economic loss, of the kind sustained by Mrs Maloney, to the owner of the house at the time when the inadequacy of the footings first becomes manifest. When such economic loss is eventually sustained and there is no intervening negligence or other causative event, the causal proximity between the loss and builder's lack of reasonable care is unextinguished by either lapse of time or change of ownership.

The only factor which arguably precludes the recognition of a relevant relationship of proximity between builder and subsequent owner for the purposes of the present case is the kind of damage involved, namely, mere economic loss. As has been seen, a relevant relationship of proximity would have existed between the builder and Mrs Maloney with respect to ordinary physical injury to her person or other property caused by a partial collapse of the house due to its inadequate footings even if she had not been the owner. Here again, it is important to bear in mind the particular kind of economic loss involved. As has been said, the distinction between that kind of economic loss and ordinary physical damage to property is an essentially technical one. Indeed, the economic loss sustained by the owner of a house by reason of diminution in value when the inadequacy of the footings first becomes manifest by consequent damage to the fabric of the house is, at least arguably, less remote and more readily foreseeable than ordinary physical damage to other property of the owner which might be caused by an actual collapse of part of the house as a result of the inadequacy of those footings. Again, the policy considerations underlying the reluctance of the Courts to recognize a relationship of proximity and a consequential duty of care in cases of mere economic loss are largely inapplicable to the relationship between builder and

subsequent owner as regards that particular kind of economic loss. There can be no question of inconsistency with the builder's legitimate pursuit of his or her own financial interests since, as has been seen, the builder owed a duty of care to the first owner with respect to such loss. In circumstances where the particular kind of economic loss is that sustained by an owner of the house on the occasion when the inadequacy of the footings first becomes manifest, there is no basis for thinking that recognition of a relevant relationship of proximity between builder and that owner would be more likely to give rise to liability "in an indeterminate amount ... to an indeterminate class" than does recognition of such an element of proximity in the relationship between builder and first owner. It is true that, in so far as "an indeterminate time" is concerned, the time span in which liability to a subsequent owner might arise could be greater than if liability were restricted to the first owner. Nonetheless, the extent of that time span would be limited by the element of reasonableness both in the requirement that damage be foreseeable and in the content of the duty of care cf. *Askin v. Knox* [1989] 1 NZLR 248. In any event, it would *prima facie* correspond with that applicable to the relationship of proximity which clearly exists as regards physical injury to person or other property. Moreover, any difference in duration between liability to the first owner and liability to a subsequent owner is likely to do no more than reflect the chance element of whether and when the first owner disposes of the house.

Upon analysis, the relationship between builder and subsequent owner with respect to the particular kind of economic loss is, like that between the builder and first owner, marked by the kind of assumption of responsibility and known reliance which is commonly present in the categories of case in which a relationship of proximity exists with respect to pure economic loss. In ordinary circumstances, the builder of a house undertakes the responsibility of erecting a structure on the basis that its footings are adequate to support it for a period during which it is likely that there will be one or more subsequent owners. Such a subsequent owner will ordinarily have no greater, and will often have less, opportunity to inspect and test the footings of the house than the first owner. Such a subsequent owner is likely to be unskilled in building matters and inexperienced in the niceties of real property investment. Any builder should be aware that such a subsequent owner will be likely, if inadequacy of the footings has not become manifest, to assume that the house has been competently built and that the footings are in fact adequate.

Ultimately, it seems to us that, from the point of view of proximity, the similarities between the relationship between builder and first owner and the relationship between builder and subsequent owner as regards the particular kind of economic loss are of much greater significance than the differences to which attention has been drawn, namely, the absence of direct contact or dealing and the possibly extended time in which liability might arise. Both relationships are characterized, to a comparable extent, by assumption of responsibility on the part of the builder and likely reliance on the part of the owner. No distinction can be drawn between the two relationships in so far as the foreseeability of the particular kind of economic loss is concerned: it is obviously foreseeable that that loss will be sustained by whichever of the first or subsequent owners happens to be the owner at the time when the inadequacy of the footings becomes manifest. In the absence of competing or intervening negligence or other causative event, the causal proximity between negligence on the part of the builder in constructing the footings and consequent economic loss on the part of the owner when the inadequacy of the footings becomes manifest is the same regardless of whether the owner in question is the first owner or a subsequent owner. In the case of both

relationships, the policy considerations which ordinarily militate against the recognition of a relationship of proximity and a consequent duty of care with respect to pure economic loss are insignificant. Moreover, there are persuasive policy reasons supporting the recognition of a relationship of proximity between the builder and a subsequent owner of an ordinary dwelling house with respect to the particular kind of economic loss. As Wright J pointed out, at first instance, a number of those policy considerations were identified in the judgment of the Supreme Court of New Hampshire, delivered by Thayer J, in *Lempke v. Dagenais* [1988] 547 A 2d 290 at 294-295; see, also, Sir Robin Cooke, *"An Impossible Distinction"*, [1991] 107 *Law Quarterly Review* 46 at 61-63. They include the consideration that, by virtue of superior knowledge, skill and experience in the construction of houses, it is likely that a builder will be better qualified and positioned to avoid, evaluate and guard against the financial risk posed by latent defect in the structure of a house *Lempke v. Dagenais* [1988] 547 A 2d at 295, quoting Whichard J in *George v. Veach* [1984] 313 SE 2d 920 at 923. In all the circumstances, the relationship between builder and subsequent owner as regards the particular kind of economic loss should be accepted as possessing a comparable degree of proximity to that possessed by the relationship between builder and first owner and as giving rise to a duty to take reasonable care on the part of the builder to avoid such loss.

The conclusion that a relationship of proximity existed between Mr Bryan, as the builder, and Mrs Maloney, as subsequent owner, with respect to the particular kind of economic loss is also supported by analogy with the relationship which would have existed between Mr Bryan, as the builder, and any person who suffered physical injury to person or property in the event that the house or part of the house had collapsed at the time when the inadequacy of the foundations first became manifest see note 28. It is difficult to see why, as a matter of principle, policy or common sense, a negligent builder should be liable for ordinary physical injury caused to any person or to other property by reason of the collapse of a building by reason of the inadequacy of the foundations but be not liable to the owner of the building for the cost of remedial work necessary to remedy that inadequacy and to avert such damage. Indeed, there is obvious force in the view expressed by Lord Denning M.R. in *Dutton v. Bognor Regis Urban District Council* [1972] 1 QB 373 at 396 that, as a rational basis for differentiating between circumstances of liability and circumstances of no liability, such a distinction is an "impossible" one.

One cannot but be conscious of the fact that the conclusion that Mr Bryan is liable in damages to Mrs Maloney in the present case is contrary to the views expressed by the members of the House of Lords in *D. & F. Estates Ltd. v. Church Commissioners* [1989] AC 177 and *Murphy v. Brentwood District Council* [1991] 1 AC 398. The *D. & F. Estates Ltd.* Case was concerned with the liability of a building contractor to a subsequent leaseholder under a 98 year lease of a flat. *Murphy v. Brentwood District Council* was concerned with the liability of a local council. It is, however, apparent that, in each case, their Lordships considered that a negligent builder's liability under the law of negligence did not extend to compensating either the first or a subsequent owner for economic loss sustained when the inadequacy of the footings of a building first becomes manifest by reason of consequent damage to the fabric of the building see *D. & F. Estates Ltd. v. Church Commissioners* [1989] AC at 210, 216-217; *Murphy v. Brentwood District Council* [1991] 1 AC at 475, 480, 488-489, 494-498; *Department of the Environment v. T. Bates Ltd.* [1991] 1 AC at 519. Their Lordships' view in that regard seems to us, however, to have rested upon a narrower view of the scope of the modern law of negligence and a more rigid compartmentalization of contract and tort than is acceptable under the law of this country.

On the other hand, the conclusion that such a duty of care existed is supported by persuasive Canadian (see *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co. Ltd.*, an unreported decision of the Supreme Court of Canada. There, the Supreme Court, in a judgment delivered by La Forest J, did not accept the approach to the relationship between contract and tort adopted by the House of Lords in *D. & F. Estates and Murphy* but adopted a similar approach to that accepted in this country. La Forest J referred to the decision of the Full Court of the Supreme Court of Tasmania in this case with approval) and New Zealand (see, in particular, *Bowen v. Paramount Builders* [1977] 1 NZLR 394; *Mt Albert Borough Council v. Johnson* [1979] 2 NZLR 234; *Askin v. Knox* [1989] 1 NZLR 248) authority and by the weight of recent decisions in the Supreme Courts of this country (see *National Mutual Life Association of Australasia Ltd. v. Coffey & Partners Pty. Ltd.* [1991] 2 Qd R 401; *Opat v. National Mutual Life* [1992] 1 VR 283; *Lowden v. Lewis* [1989] Tas R 254; *Brumby v. Pearton* [1991] 10 BCL 291 (Supreme Court of Tasmania); *Miell v. Hatjopoulos* [1987] 4 BCL 226). It also supported by some United States cases (see, e.g., *Coburn v. Lenox Homes Inc.* [1977] 378 A 2d 599; *Brown v. Fowler* [1979] 279 NW 2d 907; *Terlinde v. Neely* [1980] 271 SE 2d 768 at 770; *Drexel Properties Inc. v. Bay Colony* [1981] 406 So 2d 515; *Cosmopolitan Homes Inc. v. Weller* [1983] 663 P 2d 1041; *McMillan v. Brune-Harpenau-Torbeck Builders* [1983] 455 NE 2d 1276; *Huang v. Garner* [1984] 203 Cal Rptr 800). The United States Courts have not, however, spoken with concordant voices and the trend in that country would seem to be to recognize liability to a subsequent purchaser but to base it upon a transferable warranty of habitability (not requiring privity) rather than on ordinary negligence (see, e.g., *Barnes v. Mac Brown and Company Inc.* [1976] 342 NE 2d 619; *Moxley v. Laramie Builders Inc.* [1979] 600 P 2d 733; *Terlinde v. Neely* [1980] 271 SE 2d at 768-769; *Blagg v. Fred Hunt Co. Inc.* [1981] 612 SW 2d 321; *Redarowicz v. Ohlendorf* [1982] 441 NE 2d 324; *Gupta v. Ritter Homes Inc.* [1983] 646 SW 2d 168; *Lempke v. Dagenais* [1988] 547 A 2d 290).

It should be apparent from what has been written above that the decision in this case turns, to no small extent, on the particular kind of economic loss involved, namely, the diminution in value of a house when the inadequacy of its footings first becomes manifest by reason of consequent damage to the fabric of the house. In particular, the nature of the property involved, namely a building which was erected to be used as a permanent dwelling house, constitutes an important consideration supporting the conclusion that a relevant relationship of proximity existed between Mr Bryan, as the builder, and Mrs Maloney, as a subsequent owner. That being so, the decision in this case is not directly decisive of the question whether a relevant relationship of proximity exists in other categories of case or as regards other kinds of damage. In particular, the decision in this case should not be seen as determinative of the question whether a relationship of proximity can, in some circumstances, exist between the manufacturer and the purchaser or subsequent owner of a chattel in respect of the diminution in the value of the chattel which is sustained when a latent defect in it first becomes manifest cf. *Rivtow Marine Ltd. v. Washington Iron Works* [1973] 40 DLR (3d) 530.

The appeal should be dismissed.

Brennan J:

Mrs Manion engaged her brother-in-law Mr Bryan, a builder, to build a house for her at 2 Wintercole Court, Launceston. She had a set of plans for the house, but there were no specifications other than what was written on the plans. Mr Bryan undertook to build the house on a "do and charge" basis, that is, he was paid for the work he actually did and for

the materials he actually supplied. The house was built between August and December 1979. Subsequently, Mrs Manion sold 2 Wintercole Court to Mr and Mrs Quittenden. In May 1986, they sold to Mrs Maloney, the plaintiff respondent.

Mrs Maloney made three cursory inspections of the house before she bought it. She did not notice any cracks at that time. She bought the house thinking "that it was properly built". About six months later, Mrs Maloney noticed a crack in the concrete slab in the carport. Later, other cracks appeared in the house. Wintercole Court is in an area containing reactive clays which require special precautions to be taken against failure of building footings. The cracks were caused by failure of the footings. Mrs Maloney sued Mr Bryan, the defendant appellant, for damages for negligence and recovered a judgment in the Supreme Court of Tasmania. Although the building inspector of the Local Authority had inspected and passed the trenches and reinforcing for the footings before the concrete was poured, Wright J found that the footings were not fabricated to a standard to be expected of a reasonably competent builder in 1979. An appeal to the Full Court was dismissed. Mr Bryan submits that he owed no relevant duty of care to Mrs Maloney and that, in substance, is the ground of his appeal to this Court.

Mrs Maloney's Damage

An architect, Mr Newman, furnished an estimate in March 1989 of the cost of underpinning the footings and repairing the defects that had appeared in 2 Wintercole Court. By the time of the trial, that estimate had increased by $3,780 to $35,280.68. Wright J disallowed two of the items in Mr Newman's list and assessed Mrs Maloney's damages at $34,440.68. There was no evidence as to the price which Mrs Maloney had paid for 2 Wintercole Court, nor as to the effect of the appearance of cracking on its value. Her damages were assessed as being the cost at the time of trial of making the footings sound and repairing the physical defects caused by the inadequacy of the footings.

The facts which attracted the award and in respect of which damages were assessed were the physical defects of the house at 2 Wintercole Court. The damages assessed represent a pecuniary outlay which Mrs Maloney would have to make to have those defects rectified and in that sense she can be said to have suffered economic loss. It is not suggested that Mrs Maloney was bound to expend the amount recovered or, indeed, any amount on rectifying the inadequate footings and the physical defects caused thereby. Although it was conceded on appeal that the damage suffered by Mrs Maloney was pure economic loss, that concession cannot conceal the facts by reference to which this case must be decided. Pure economic loss means economic loss that is not consequent on physical damage to a person or to property. Mrs Maloney's damage consisted of the defects in her house and the measure of the damages awarded for those defects was the cost of their rectification. As the duty of care that is in issue is a duty to avoid or prevent the damage for which the damages were awarded *Overseas Tankship (UK) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound (No. 1))* [1971] AC 388 at 425; *Sutherland Shire Council v. Heyman* [1985] 157 CLR 424 at 487; *Murphy v. Brentwood District Council* [1991] 1 AC 398 at 485-486, the question is whether Mr Bryan owed Mrs Maloney as a future owner of the house a duty of care to prevent the existence of the inadequate footings and the occurrence of the physical defects caused by the inadequacy of the footings.

The cases dealing with an architect's or builder's liability in negligence for carelessly designing or constructing a building have been concerned to distinguish between two general categories of damage. The first category consists of physical damage to person or property for which a defendant is, and always has been, liable under the paradigm application of

Donoghue v. Stevenson [1932] AC 562; the second category consists of pure economic loss for which a defendant may be liable in negligence under principles that have been developed from Lord Atkin's original conception in that case, especially since *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465. It is not the pecuniary character of damages or even the manner of their calculation which is significant but the kind of loss or damage suffered by the plaintiff in respect of which an award of damages is sought. The distinction between the two categories of damage has served to distinguish cases where, in the absence of any contrary factor see, for example, *Gala v. Preston* [1991] 172 CLR 243, reasonable foreseeability of the kind of damage actually suffered is sufficient to give rise to the defendant's duty of care from cases where reasonable foreseeability alone does not give rise to such a duty *San Sebastian Pty. Ltd. v. The Minister* [1986] 162 CLR 340 at 367. The distinction is important. The tort of negligence imposes liability on a defendant for doing something which causes loss to another even though the thing done is otherwise lawful. If liability were to be imposed for the doing of anything which caused pure economic loss that was foreseeable, the tort of negligence would destroy commercial competition see per Lord Reid in *Dorset Yacht Co. v. Home Office* [1970] AC 1004 at 1027 sterilize many contracts and, in the well-known *dictum* of Cardozo CJ *Ultramares Corporation v. Touche* [1931] 255 NY 170 (174 NE 441 at 444), expose defendants to potential liability "in an indeterminate amount for an indeterminate time to an indeterminate class". For those reasons, the tort of negligence has not offered a remedy for the recovery of pure economic loss from a defendant against whom no more is proved than that his or her actions caused that loss and the loss was reasonably foreseeable. In *Murphy v. Brentwood District council* [1991] 1 AC 398 at 487. Lord Oliver described the "something more" as "that elusive element comprehended in the expression 'proximity'". I prefer a more definitive statement of "some special principle" (to use the words of Robert Goff LJ in *Leigh and Sillivan Ltd. v. Aliakmon Ltd.* [1985] QB 350 at 396) to warrant recovery of pure economic loss. See the discussion of "proximity" below, Lord Oliver of Aylmerton said:

> The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not. If it is to be categorised as wrongful it is necessary to find some factor beyond the mere occurrence of the loss and the fact that its occurrence could be foreseen. Thus the categorisation of damage as economic serves at least the useful purpose of indicating that something more is required and it is one of the unfortunate features of *Anns* that it resulted initially in this essential distinction being lost sight of.

Personal injury is the primary example of damage which a defendant is under a duty to take reasonable care to avoid where it is reasonably foreseeable that the defendant might cause damage of that kind if reasonable care be not exercised. Thus, in *Voli v. Inglewood Shire Council* [1963] 110 CLR 74, an architect was held liable in negligence when, in designing a building, he failed to use the competence and skill in design usual among architects practising their profession and, as a reasonably foreseeable result, the building collapsed and injured a plaintiff. In that case, Windeyer J said *ibid*. at 84:

> Whatever might have been thought to be the position before the broad principles of the law of negligence were stated in modern form in *Donoghue v. Stevenson*, it is now beyond doubt that, for the reasonably foreseeable consequences of careless or unskillful conduct, an architect is liable to anyone whom it could reasonably have been expected might be injured as a result of his negligence. To such a person he owes a duty of care quite independently of his contract of employment.

Similarly, damage to property is damage which a defendant is under a duty to take reasonable care to avoid where it is reasonably foreseeable that the defendant might cause damage of that kind if reasonable care be not used see, for example, *Vaughan v. Webb* [1902] 2 SR (NSW) 293. Although a plaintiff who is entitled to recover damages in negligence for personal injury or for damage to property is entitled to compensation for the economic *sequelae* of the personal injury or the damage to the property *Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad"* [1976] 136 CLR 529 at 544, mere foreseeability of pure economic loss has been rejected as a sufficient criterion of the existence of a duty of care to avoid it *ibid*. at 555, 572-574, 590-592; cf. *Leigh & Sillavan Ltd. v. Aliakmon Ltd.* [1986] AC 785 at 813-820 and the dissenting judgment of Robert Goff LJ in [1985] QB at 392-394, 396.

In the present case, we may put to one side for the moment consideration of the circumstances in which a duty of care to avoid pure economic loss arises and examine Mr Bryan's duty to prevent the physical defects in the house at 2 Wintercole Court for which Mrs Maloney's damages were awarded. The question is whether, by the law of negligence, a builder of a building (or an architect who designs the building) is under a duty of care to avoid the creation or development of defects in the building, the rectification of which would involve the incurring of expenditure. A similar question is whether the manufacturer of a chattel is under a duty of care to avoid the creation or development of defects in the chattel, the remedying or repair of which would involve the incurring of expenditure. The question is not whether the builder or manufacturer might be liable for personal injury or damage to property resulting from the defect produced by negligent building or manufacture, but whether the builder or manufacturer might be liable for defects in the building or chattel itself. It is the defective quality of the building or chattel, not the results external to the building or chattel, that is postulated as the damage in respect of which the question of the builder's or manufacturer's duty of care arises.

In *Dutton v. Bognor Regis Urban District Council* [1972] 1 QB 373 at 396, Lord Denning MR propounded the proposition that unseen defects in the original construction of a building which caused other defects to become apparent are physical damage to the building which the persons responsible for the condition of the building were under a duty of care to avoid under the principles stated in *Donoghue v. Stevenson*. In *Dutton*, his Lordship held the defendant Council liable for breach of a duty of care to ensure that an inspection of the foundations of the house at the time of its construction was properly carried out. Lord Denning said *ibid*:

> The damage done here was not solely economic loss. It was physical damage to the house. If (the Council's) submission were right, it would mean that if the inspector negligently passes the house as properly built and it collapses and injures a person, the council are liable: but if the owner discovers the defect in time to repair it - and he does repair it - the council are not liable. That is an impossible distinction. They are liable in either case.

His Lordship thus conflated, in determining the existence of a duty of care, defects in the house and physical damage to the person of a third party caused by defects in the house.

Similar views were stated in New Zealand in *Bowen v. Paramount Builders* [1977] 1 NZLR 394, where the Court of Appeal held that an action would lie at the suit of a purchaser of a house against the builder whose negligent workmanship results in a latent defect that causes actual physical damage to the structure. The Court saw no ground for distinguishing between negligence causing foreseeable personal injury or damage to property and negligence in construction causing defects in the structure of the house *ibid*. at 410, 417-418, 425. In his partially dissenting judgment in *Rivtow Marine Ltd. v. Washington Iron Works* [1973] 40

DLR (3d) 530 at 549-552 Laskin J held that a defendant who was negligent in the manufacture of a crane for a log barge was liable in negligence for the cost of rectifying the crane's defects that threatened physical damage to property or person. His Lordship equated the liability of a negligent builder with the liability of a negligent manufacturer of chattels *ibid.* at 551. In *Anns v. Merton London Borough Council* [1978] AC 728 at 759-760, Lord Wilberforce found both *Bowen v. Paramount Builders* and the judgment of Laskin J in *Rivtow Marine* to be of assistance. In *Anns*, Lord Wilberforce classified defects in a house that were a danger to health or safety as "material, physical damage" *ibid*. at 759. His Lordship there proposed the influential two-stage test of liability *ibid.* at 751-752:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

In *Murphy v. Brentwood District Council* [1991] 1 AC at 487, Lord Oliver commented:

> The two-stage test propounded by Lord Wilberforce in *Anns* was at first interpreted as indicating as a universal proposition that the relationship between defendant and plaintiff encapsulated in the word 'proximity' arose from the foreseeability of damage alone regardless of whether the case was one of direct physical injury or of pure pecuniary loss. Both *Dutton* and *Bowen v. Paramount Builders (Hamilton) Ltd.* are examples of the application of Lord Atkin's principle as a universal.

So long as this interpretation prevailed, structural defects in a building could be classified as physical damage where the defects posed a danger to health and safety and foreseeability of such defects was sufficient to cast a duty of care on the builder.

Then, in *Junior Books Ltd. v. Veitchi Ltd.* [1983] 1 AC 520 a majority of the House of Lords admitted a claim in negligence by a building owner against a sub-contractor whose negligence in laying a floor of the building resulted not in a danger to health or safety but in additional costs in maintaining the floor during the life of the building or, alternatively, the cost of remedial work to rectify the floor's defects. In this case, the majority treated the pursuer's loss or damage as pure economic loss. Lord Roskill was of the opinion that there was no physical damage *ibid*. at 545. He stated the question for decision to be whether the law "extends the duty of care beyond a duty to prevent harm being done by faulty work to a duty to avoid such faults being present in the work itself". Lord Wilberforce's two-fold test was advanced as the means of controlling the extent of tortious liability. Lord Roskill looked for *ibid*. at 542:

> reasons why, it being conceded that the appellants owed a duty of care to others not to construct the flooring so that those others were in peril of suffering loss or damage to their persons or their property, that duty of care should not be equally owed to the respondents. The appellants, though not in direct contractual relationship with the respondents, were as nominated sub-contractors in almost as close a commercial relationship with the respondents as it is possible to envisage short of privity of contract. Why then should the appellants not be under a duty to the respondents not to expose the respondents to a possible liability to financial loss for repairing the flooring should it prove that that flooring had been negligently constructed?

In this passage, his Lordship seems to endorse the proposition that *prima facie* a builder is under a duty of care to avoid faults in the building work whenever the builder is under a duty to prevent personal injury or property damage caused by faults in the building work. Further, if the relationship between the sub-contractor and the building owner is closely analogous to that of contracting parties, the tort of negligence *prima facie* offers to the owner compensation for the cost of rectifying defects - the same relief as the law of contract provides for breach of warranty. With respect, I would not accept either proposition.

Lord Roskill treated Lord Wilberforce's first limb test of "proximity" as encompassing factors in addition to foreseeability. His Lordship identified eight factors as being of crucial importance to "proximity" *ibid.* at 546 including reliance by the building owner upon the skill and experience of the sub-contractor. By reference to those factors, he held the sub-contractor liable in negligence, but on the footing that the facts averred by the pursuers satisfied the criteria of liability which, in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465, had been held to give rise to a duty of care where damages were sought for pure economic loss [1983] 1 AC at 546. Reliance by the pursuers on the skill and knowledge of the sub-contractor was an important factor in the reasoning of Lord Fraser of Tullybelton *ibid*. at 533 which led him to uphold the pursuer's averments. Lord Keith's concurrence was based on other considerations but he found *ibid*. at 536 that he was:

> unable to regard the deterioration of the flooring which is alleged in this case as being damage to the respondents' property such as to give rise to a liability falling directly within the principle of *Donoghue v. Stevenson*. The flooring had an inherent defect in it from the start. The appellants did not, in any sense consistent with the ordinary use of language or contemplated by the majority in *Donoghue v. Stevenson*, damage the respondents' property. They supplied them with a defective floor. Such an act can, in accordance with the views I have expressed above, give rise to liability in negligence in certain circumstances. But it does not do so merely because the flooring is defective or valueless or useless and requires to be replaced.

Lord Brandon of Oakbrook dissented, saying *ibid* at 549:

> It is, however, of fundamental importance to observe that the duty of care laid down in *Donoghue v. Stevenson* was based on the existence of a danger of physical injury to persons or their property. That this is so, is clear from the observations made by Lord Atkin [1932] AC at 581-582 with regard to the statements of law of Brett MR in *Heaven v. Pender* [1883] 11 QBD 503 at 509. It has further, until the present case, never been doubted, so far as I know, that the relevant property for the purpose of the wider principle on which the decision in *Donoghue v. Stevenson* was based, was properly *other than the very property which gave rise to the danger of physical damage concerned*.
>
> My Lords, I have already indicated my opinion that the wider principle on which the decision in *Donoghue v. Stevenson* was based applies to the present case. The effect of its application is that the appellants owed a duty to the respondents to exercise reasonable care so to mix and lay the flooring as to ensure that it did not, when completed and put to its contemplated use, constitute a danger of physical damage to persons or their property, *other than the flooring itself*. (Emphasis added.)

The proposition of the majority that the pursuer's damage was pure economic loss was essential to escape the established principle that defects in the quality of the building are not compensable under the law of negligence. If the pursuer's claim was to be allowed to proceed, the damage had to be treated as pure economic loss. The decision in *Junior Books* was subjected to sustained criticism noted by May J in his judgment in *Nitrigin Eireann Teoranta v. Inco Alloys Ltd.* [1992] 1 WLR 498 at 504; [1922] 1 All ER 854 at 860 and the

dissenting speech of Lord Brandon has subsequently been regarded in England as containing the sounder statement of principle *D. & F. Estates Ltd. v. Church Commissioners* [1989] AC 177 at 202-204, 215; *Murphy v. Brentwood District Council* [1991] 1 AC at 469. If the majority decision is supportable, it can be supported only on the footing that the building owner suffered economic loss in reliance on the advice of the sub-contractor that the work had been properly done. The *Hedley Byrne* doctrine of reliance is the only foundation on which, on one view of the facts, *Junior Books* might have rested *D. & F. Estates* [1989] AC at 215; *Murphy v. Brentwood District Council* [1991] 1 AC at 466, 481; *Nitrigin Eireann Teoranta v. Inco Alloys Ltd.* [1992] 1 WLR at 504-505; [1992] 1 All ER AT 860, but it seems that in England *Junior Books* now lacks authority *Simaan Contracting Co. v. Pilkington Ltd. (No. 2)* [1988] QB 758 at 784.

In *Junior Books* [1983] 1 AC at 551-552 Lord Brandon advanced cogent reasons of policy for rejecting the pursuers' allegation of the subcontractor's duty of care to prevent or avoid non-dangerous defects in the concrete floor which it had mixed and laid. He said:

> The effect of accepting the respondents' contention with regard to the scope of the duty of care involved would be, in substance, to create, as between two persons who are not in any contractual relationship with each other, obligations of one of those two persons to the other which are only really appropriate as between persons who do have such a relationship between them.
>
> In the case of a manufacturer or distributor of goods, the position would be that he warranted to the ultimate user or consumer of such goods that they were as well designed, as merchantable and as fit for their contemplated purpose as the exercise of reasonable care could make them. In the case of sub-contractors such as those concerned in the present case, the position would be that they warranted to the building owner that the flooring, when laid, would be as well designed, as free from defects of any kind and as fit for its contemplated purpose as the exercise of reasonable care could make it. In my view, the imposition of warranties of this kind on one person in favour of another, when there is no contractual relationship between them, is contrary to any sound policy requirement.
>
> It is, I think, just worth while to consider the difficulties which would arise if the wider scope of the duty of care put forward by the respondents were accepted. In any case where complaint was made by an ultimate consumer that a product made by some persons with whom he himself had no contract was defective, by what standard or standards of quality would the question of defectiveness fall to be decided? ... In the case of sub-contractors such as the appellants in the present case, it could hardly be the standard prescribed by the contract between the sub-contractors and the main contractors, for, although the building owner would probably be aware of those terms, he could not, since he was not a party to such contract, rely on any standard or standards prescribed in it. It follows that the question by what standard or standards alleged defects in a product complained of by its ultimate user or consumer are to be judged remains entirely at large and cannot be given any just or satisfactory answer.

It was, of course, no answer to the plaintiff's claim in *Donoghue v. Stevenson* that the quality of the ginger beer was the subject of contract between the defendant and the cafe proprietor. Nor did the architect's contract with the building owner in *Voli v. Inglewood Shire Council* affect the injured plaintiff's right to recover in that case. But these were cases where the duty imposed by law, in addition to any contractual duty, was a duty to avoid or prevent physical injury. It is another question whether the law should impose, in favour of a remote purchaser, a duty on a builder or manufacturer to build buildings or manufacture chattels of a certain quality when the building or chattel will be sold in an open market in which price reflects, or may be negotiated to reflect, the quality of the thing to be sold. Absent of any risk of damage to person or property, why should the law impose a duty to protect the

purchaser's financial interests? The financial interests of a house purchaser are not protected against the immediate vendor except by such terms as are agreed between them in striking their bargain: *caveat emptor*.

As Lord Bridge of Harwich noted in *D. & F. Estates Ltd. v. Church Commissioners* [1989] AC 117 at 204, Lord Brandon's reasons for refusing to impose on builders a duty of care to remote purchasers receives powerful support from the judgment of Blackmun J, delivering the opinion of the Supreme Court of the United States in *East River Steamship Corp. v. Transamerica Delaval Inc.* [1986] 476 US 858 at 870, referred to also by Lord Keith in *Murphy v. Brentwood District Council* [1991] 1 AC at 469, in which his Honour observed that:

> the failure of the purchaser to receive the benefit of its bargain (is) traditionally the core concern of contract law.

His Honour subscribed [1986] 476 US at 871 to "the need to keep products liability and contract law in separate spheres and to maintain a realistic limitation on damages", observing that:

> When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong.

I respectfully agree, else any tortious duty owed to a remote purchaser would be affected by a contract to which the purchaser was not a party.

A duty to take reasonable care in constructing a building to avoid or prevent personal injury is cast upon a builder "not because he made a contract, but because he entered upon the work" *Voli v. Inglewood Shire Council* [1963] 110 CLR at 85. If the same approach were taken to the definition of a builder's duty to a remote purchaser to prevent the occurrence of defects in the building, the builder would not be liable to the purchaser for defects arising from work which had not been done and which the builder had not been required to do. The purchaser, however, would probably know nothing of the extent of the contract works or the financial constraints which dictated their limits see *Simaan Contracting Co. v. Pilkington Ltd. (No. 2)* [1988] QB at 782-783. If the financial interests of the remote purchaser were to be protected by the law of negligence rather than by the law of contract, those interests could be affected by the scope of the building contract to which the purchaser was not a party. In the present case, for example, it would have been critical to determine whether Mrs Manion gave Mr Bryan authority to commission - and was willing to pay for - the soils investigation that would have revealed the presence of reactive clays at 2 Wintercole Court or to carry out the "special precautions" that would be needed if Mr Bryan had proceeded, as Wright J found he ought to have proceeded, "on the assumption that it was likely that Wintercole Court was an area of moderate to high reactivity". If the law were to admit the postulated tortious duty of care owed to a remote purchaser to prevent or avoid any defects in the building, the builder's contract with the building owner would not only affect the standard of care in doing the work within the scope of the contract (as Lord Brandon pointed out) but also determine which defects are outside the scope of the contract and hence outside the postulated tortious duty and which defects are within the scope of both the contract and the postulated duty.

The acceptance of Lord Brandon's view in *Junior Books* marked the abandonment as a forensic failure of the notion that a builder is liable in negligence for physical defects in the building itself. Even before *Anns* was overturned in the House of Lords (*Murphy v. Brentwood District Council* [1991] 1 AC 398; *Department of the Environment v. T. Bates Ltd.* [1991] 1 AC 499), their Lordships held in *D. & F. Estates* [1989] AC 177. (The complex structure theory

which was provisionally advanced (at 207, 214) to account for the recovery of damages for structural defects in *Anns v. Merton London Borough Council* was abandoned in *Murphy v. Brentwood District Council* [1991] 1 AC at 470, 478-479, 484 and 497) that no action lies in negligence where the relevant damage consists only of physical defects in building caused by carelessness in its construction. In that case, Lord Bridge observed that economic loss caused by a latent defect in a chattel is recoverable in contract by a buyer or hirer of the chattel entitled to the benefit of a warranty, but is not recoverable in tort by a remote buyer or hirer. He added [1989] AC at 206:

> If the same principle applies in the field of real property to the liability of the builder of a permanent structure which is dangerously defective, that liability can only arise if the defect remains hidden until the defective structure causes personal injury or damage to property other than the structure itself. If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic. Thus, if I acquire a property with a dangerously defective garden wall which is attributable to the bad workmanship of the original builder, it is difficult to see any basis in principle on which I can sustain an action in tort against the builder for the cost of either repairing or demolishing the wall. No physical damage has been caused. All that has happened is that the defect in the wall has been discovered in time to prevent damage occurring.

In *Sutherland Shire Council v. Heyman* [1985] 157 CLR 424, this Court declined to follow *Anns*. In reference to the classification of defects in a building as "material, physical damage", Deane J, in a passage *ibid*. at 504; see also at 490 and cf. at 446-447, 446, 471 with which Lord Keith expressed his agreement in *Murphy v. Brentwood District Council* [1911] 1 AC at 466-468, said:

> Whatever may be the position with respect to consequential damage to the fabric of the building or to other property caused by subsequent collapse or subsidence, the loss or injury involved in the actual inadequacy of the foundations cannot, in the case of a person who purchased or leased the property after the inadequacy existed but before it was known or manifest, properly be seen as ordinary physical or material damage. The only property which could be said to have been damaged in such a case is the building. The building itself could not be said to have been subjected to 'material, physical damage' by reason merely of the inadequacy of its foundations since the building never existed otherwise than with its foundations in that state. Moreover, even if the inadequacy of the foundations could be seen as material, physical damage to the building, it would be damage to property in which a future purchaser or tenant had no interest at all at the time when it occurred.

With so much of his Honour's analysis of the nature of the damage arising from inadequacy of a building's foundations, I respectfully agree see *Sutherland Shire Council v. Heyman* [1985] 157 CLR at 490-491. It follows that, if there be no physical damage of the kind to which Lord Atkin was directing his speech in *Donoghue v. Stevenson*, no duty of care to prevent or avoid it arises from the basic principles of negligence expressed by his Lordship in that case.

When *Anns* was overturned in *Murphy v. Brentwood District Council*, the notion that damages in tort were recoverable from the builder or manufacturer for defects in the construction of a building or of a chattel was rejected [1991] 1 AC at 457, 464, 475, 480, 489, 498. Lord Oliver said *ibid* at 484:

> (A)lthough the 'damage' was described, both in the Court of Appeal in *Dutton* and in this House in *Anns*, as physical or material damage, this simply does not withstand analysis. To begin with, it makes no sort of sense to accord a remedy where the defective nature of the structure has manifested itself by some physical symptom, such as a crack or a fractured

> pipe, but to deny it where the defect has been brought to light by, for instance, a structural survey in connection with a proposed sale. Moreover, the imminent danger to health or safety which was said to be the essential ground of the action was not the result of the physical manifestations which had appeared but of the inherently defective nature of the structure which they revealed. They were merely the outward signs of a deterioration resulting from the inherently defective condition with which the building had been brought into being from its inception and cannot properly be described as damage caused to the building in any accepted use of the word 'damage'.

However, it is artificial to classify defects in a building as pure economic loss. Defects in a building are physical defects and the cost of their rectification is consequential on their existence. The defects are not physical damage the foreseeability of which gives rise to a *prima facie* duty of care, but it does not follow that the cost of rectifying such physical defects in order to improve the quality of the building is pure economic loss which may attract an award of damages for negligence.

Where the question is whether a duty of care relating solely to the quality of the building or chattel bought by a purchaser should be imposed by the law of tort or the law of contract, the answer, in my opinion, is that the interests to be protected are appropriately to be governed by the law of contract (But cf. Fleming, "*Tort in a Contractual Matrix*", [1993] 5 Canterbury Law Review 269). As between a builder and the original owner of a building, any claim between them relating to the condition of the building is properly to be determined by the contract which governs their relationship, not by the law of tort see *Tai Hing Ltd. v. Liu Chong Hing Bank* [1986] AC 80 at 107. The doing of work for reward is a matter governed by the agreement between the party doing the work and the party requesting that the work be done. They fix their own rights and liabilities on issues of purely economic significance. The work to be performed, the quality and value of that work and the cost of repairing defects in work ill-done are thus properly the concerns of the law of contract. A claim by a remote purchaser against a vendor relating to the condition of the building is also properly to be determined by the law of contract. But physical damage to person or property arising from the construction of a building or the manufacture of a chattel is properly the concern of the law of tort. That is not to say that damage to person or property might not be produced by breach of contract nor to say that pure economic loss cannot be recovered in certain circumstances in tort. In *Voli v. Inglewood Shire Council* [1963] 110 CLR at 84, Windeyer J spoke of an architect's liability as arising "either from a breach of his contract or in tort", but his Honour was there speaking of a liability in respect of physical damage to person or property.

It would be anomalous to have claims relating to the condition of the building by an original owner against the builder determined by the law of contract if the relief claimed by the remote purchaser against the builder would be determined by the law of tort. Such a situation would expose the builder to a liability for pure economic loss different from that which he undertook in constructing the building and would confer a corresponding right on the remote purchaser which the purchaser had not sought to acquire from the vendor see *Winnipeg Condominium Corp. No. 36 v. Bird Constructions Co. Ltd.* [1993] 101 DLR (4th) 699 at 711. The observation of Huband J.A. with reference to "*caveat emptor*" is opposite to a remote purchaser's rights in respect of mere defects in a building. The decision of the Manitoba Court of Appeal was reversed by the Supreme Court which considered the defects to be a substantial danger to the health and safety of the occupants: see below. It would be tantamount to the imposition on the builder of a transmissible warranty of quality. In some jurisdictions, Parliament has provided such a remedy by statute. The social question whether binding costs should be

inflated to cover the builder's obligation under such a transmissible warranty is an appropriate question for parliaments to consider but, in the absence of compelling legal principle or considerations of justice reflecting the enduring values of the community, the Courts should not decide to extend remedies not hitherto available to remote purchasers of buildings without considering the cost to builders and the economic effect of such an extension. Those are questions which the Courts are not suited to consider. The extension of remedies in that direction is properly a matter for Parliament.

The absence of a builder's duty of care to a remote purchaser in respect of defects in the quality of the building is attributable not so much to the rejection of the classification of such defects as physical damage but to the exclusion of those defects from any category of damage for which damages in negligence might be awarded.

Builder's Liability for Pure Economic Loss

As we have seen, the majority in *Junior Books* held a sub-contractor liable in negligence to the building owner on the footing that the building owner suffered economic loss. Although *Junior Books* is not now of authority in England, there is no reason in principle why some kinds of economic loss suffered by the purchaser of a building should not be regarded as damage which can sustain an action in negligence. If the purchaser of a building suffers economic loss in consequence of paying an excessive price for the building, an action for damages for negligence might lie against a defendant on whose representation the purchaser relied in paying that price. Such a case might fall within the principles discussed in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465 and *Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt* [1968] 122 CLR 556 (HC); [1970] 122 CLR 628 (PC); [1971] AC 793 (PC). Thus a builder who negligently and falsely represents to a prospective purchaser of the building that there are no latent defects in it might be held liable for the pure economic loss suffered by payment of an excessive purchase price in reliance on the representation. In such a case, the foundation of the builder's liability would be the making of a representation in circumstances in which the law casts on the representor a duty to be careful in making it As discussed in *Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt* [1968] 122 CLR at 571; *Shaddock & Associates Pty. Ltd. v. Parramatta City Council (No. 1)* [1981] 150 CLR 225 at 251; *San Sebastian Pty. Ltd. v. The Minister* [1986] 162 CLR at 371-372. In such a case, the plaintiff's loss is a consequence of the plaintiff's reliance on the defendant's representation, reliance being "a cornerstone of liability for negligent misstatement" *San Sebastian Pty. Ltd. v. The Minister* [1986] 162 CLR at 356 - 357; cf. *Hawkins v. Clayton* [1988] 164 CLR 539 at 576. That is not the present case.

Mrs Maloney knew nothing about Mr Bryan before she bought the house. She did not know who the builder was and, in consequence, she had no grounds for relying on the builder's possession of any special skill or quality of workmanship. Clearly Mr Bryan made no representations, expressly or impliedly, to Mrs Maloney about his skill or the quality of his workmanship. No more appears than that Mrs Maloney thought the house "was properly built" by whomsoever was the builder. Unless it be right to say that any purchaser of a house that has a latent defect is presumed to rely upon an implied representation by the builder that the house is constructed with reasonable care and skill see *National Mutual Life Association of Australasia Limited v. Coffey & Partners Pty. Ltd.* [1991] 2 Qd R 401 at 406, there is no evidence in this case of representation or reliance. For my part, I would not so presume. Nor is there any evidence of economic loss incurred in reliance on Mrs Maloney's belief that the house was properly built whether that belief was induced by an imputed representation or not. There was no evidence of the price Mrs Maloney had paid for 2

Wintercole Court or whether that price was greater than the value of the property either before or after the tell-tale cracks appeared. The only damage to which Mrs Maloney pointed was the inadequacy of the footings and the consequent appearance of cracks. The damages awarded to her were not for pure economic loss.

Of course, the physical defects no doubt diminish the market value of 2 Wintercole Court. Such a diminution in market value was evidently seen by Deane J in *Sutherland Shire Council v. Heyman* to constitute economic loss for which damages in negligence might be recoverable. His Honour said [1985] 157 CLR at 504-505, cited in *Murphy v Brentwood District Council* [1991] 1 AC at 467-468:

> Loss or injury could only be sustained by ... a purchaser or tenant on or after the acquisition of the freehold or leasehold estate without knowledge of the faulty foundations. It is arguable that any such loss or injury should be seen as being sustained at the time of acquisition when, because of ignorance of the inadequacy of the foundations, a higher price is paid (or a higher rent is agreed to be paid) than is warranted by the intrinsic worth of the freehold or leasehold estate that is being acquired. Militating against that approach is the consideration that, for so long as the inadequacy of the foundations is neither known nor manifest, no identifiable loss has come home: if the purchaser or tenant sells the freehold or leasehold estate within that time, he or she will sustain no loss by reason of the inadequacy of the foundations. The alternative, and in my view preferable, approach is that any loss or injury involved in the actual inadequacy of the foundations is sustained only at the time when that inadequacy is first known or manifest. It is only then that the actual diminution in the market value of the premises occurs. On either approach, however, any loss involved in the actual inadequacy of the foundations by a person who acquires an interest in the premises after the building has been completed is merely economic in its nature.

If diminution in market value be identified as the relevant loss for which damages are claimed, to what cause can that loss be attributed so as to sheet home liability to the builder if there has been no reliance on a representation by a builder? The only relevant cause of the defects becoming "known or manifest" is carelessness in the initial construction of the building containing the defects. Diminution in market value thus caused is, on analysis, no more than the economic consequence of the physical condition of the building, indistinguishable in nature and *prima facie* the same in amount as the cost of rectifying the actual defects. If it be erroneous to treat those defects as damage which the builder was under a duty of care to prevent, neither the diminution in market value attributable to those defects nor the cost of rectifying those defects can be recovered in negligence.

If a remote purchaser of a building were to be entitled to damages in negligence against the builder for the cost of rectifying defects (or substantial defects) in the building attributable to the builder's negligence, in whom would the cause of action vest? For reasons which I stated in *Sutherland Shire Council v. Heyman* [1985] 157 CLR at 490-493; see also the judgment of Deane J first cited above, if the physical defects in the building as constructed by a negligent builder were to be treated as relevant damage, it could be suffered only by a person who has an interest in the building at the time when the damage is done. Ordinarily that person is the first owner of the building whose relationship with the builder and whose right to damages against the builder are governed by the building contract.

If diminution in market value consequent on the defects being delivered or becoming patent were treated as the relevant damage, an anomaly would be created. A vendor who discovers latent defects but who sells in an uninformed market would produce no damage. Absent fraud on the part of the vendor, the purchaser would be bound by the maxim *caveat emptor*. If the defects were known to the vendor, would the purchaser be denied relief? Conversely,

would a purchaser who knew of the defect at the time of purchase acquire a cause of action if the vendor did not then know of it? If damage were treated as occurring only when the diminution in value occurs in an informed market, and the measure of damages were calculated by reference to what the building would have fetched if the defects were not in existence, would those damages be recoverable by a vendor who had bought the building at an undervalue? These questions, which may admit of satisfactory answers, indicate the difficulty of ignoring the fact that the economic loss which is said to constitute the relevant damage is in truth merely the consequence of the existence of the building defects. Unless there be a tortious duty of care on the part of the builder to prevent or avoid those defects, no action in negligence will lie.

In my respectful opinion Lord Brandon in *Junior Books* [1983] 1 AC at 551-552 and Blackman J in *East River Steamship Corp.* [1986] 476 US at 870 were correct in holding it to be wrong in principle to confer on remote purchasers a cause of action in tort for latent defects caused by negligence in construction of a building or manufacture of a chattel when that negligence merely affects the quality of the building or chattel.

The Canadian Doctrine: defects that are dangerous

A remedy in negligence against a builder whose carelessness in construction manifests itself in defects after the building has been acquired by a purchaser subsequent to the original owner has been allowed in certain circumstances in Canada.

In *Rivtow Marine* [1973] 40 DLR (3d) 530 the Supreme Court upheld the making of a claim by a demise character of a log barge for lost profits when it was taken out of service during the logging season for the repair of a barge crane which had proved to be defective. The repairs were necessary because of serious structural defects resulting from the crane's design and manufacture. The loss could have been avoided by the manufacturer's giving of a timely warning to the charterer so as to allow the repairs to be carried out during the slack season. The plaintiff's claim against the manufacturer to recover its lost profits was allowed to stand on the footing that the manufacturer was in breach of its duty to give a timely warning to users of the crane of its dangerous defects. But the majority endorsed the view *ibid.* at 541-542 that "liability for the cost of repairing damage to the defective article itself and for the economic loss flowing directly from the negligence, is akin to liability under the terms of an express or implied warranty of fitness and as it is contractual in origin cannot be enforced against the manufacturer by a stranger to the contract". However, Laskin J, to whose judgment Lord Wilberforce referred in *Anns*, would have allowed a claim against the manufacturer for the cost of actually repairing the crane. His Lordship said *ibid.* at 552:

> The case is not one where a manufactured product proves to be merely defective (in short, where it has not met promised expectations), but rather one where by reason of the defect there is a foreseeable risk of physical harm from its use and where the alert avoidance of such harm gives rise to economic loss. Prevention of threatened harm resulting directly in economic loss should not be treated differently from post-injury cure.

The minority view has now become the accepted view of the Supreme Court of Canada. Adhering to that Court's acceptance of Lord Wilberforce's approach in *Anns*, albeit subject to some modification *City of Kamloops v. Neilsen* [1984] 10 DLR (4th) 641 at 662-663; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* [1992] 91 DLR (4th) 289 at 371, 387, it was held in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd. and Smith Carter Partners* unreported, Supreme Court of Canada, 26 January 1995 that a builder responsible for the construction of a building may be held liable in negligence

to a subsequent purchaser of the building for the cost of repairing defects arising from negligence in construction where the defects resulting from the negligence pose "a real and substantial danger to the occupants of the building" *ibid.* at 15. La Forest J, in whose judgment the other Justices concurred, concluded (apparently in reference to the second limb of the *Anns* test of liability) that there are "no adequate policy considerations ... to negate a contractor's duty in tort to subsequent purchasers of a building to take reasonable care in constructing the building and to ensure that the building does not contain defects that pose foreseeable and substantial danger to the health and safety of the occupants" *ibid*. at 43-44. It will be remembered that Lord Brandon's dissent in *Junior Books* also acknowledged that in mixing and laying the floor that proved to be defective the sub-contractors owed to the building owner a duty of care in order "to ensure that it did not, when completed and put to its contemplated use, constitute a danger of physical damage to persons or their property, other than the flooring itself."

Once it is accepted that the damage essential to the tort of negligence may consist in pure economic loss and that a duty of care outside of contract is imposed on a builder to take reasonable care in doing his work to avoid foreseeable risks of danger to the person, there is much to be said for the views of La Forest J and Lord Brandon. The damage which may found an action in negligence against a builder or other person (whom I shall include in the term "builder") who is responsible for *dangerous* defects in a building can be seen as true economic loss consisting of the pecuniary liability imposed upon the owner (a term I use to describe the owner, occupier or other person responsible for the condition of a building) for physical damage to person or property suffered by a third person and caused by the defects attributable to the builder's negligence or consisting of money outlaid to rectify those defects before actual physical damage occurs. An owner who knows that defects in the building pose a substantial risk of physical damage to person or property of another - that is, defects which are "likely" to cause such damage - is under a duty to take any reasonable means to remove the risk *Sedleigh-Denfield v. O'Callaghan* [1940] AC 880 at 894-895, 899, 904-905, 913, 920; *Overseas Tankship (UK) Ltd. v. The Miller Steamship Co. Pty. (The Wagon Mound (No. 2))* [1967] 1 AC 617 at 639; *Cartwright v. McLaine & Long Pty. Ltd.* [1979] 143 CLR 549 at 553, 568; *Montana Hotels v. Fasson* [1986] 69 ALR 258 at 262. Indeed, an owner of a building may sometimes be liable to persons entering on the premises for damage caused by defects in the building attributable to the builder even though the owner was unaware of the defects *Voli v. Inglewood Shire Council* was such a case. If the owner rectifies the defects in order to remove the risk of damage to person or property, the expense of removal can be seen as an economic loss incurred to remove the risk, rather than the consequence of the physical defects. If expense is reasonably incurred in removing the risk, it is right that the party incurring it should be indemnified by the party who, if the risk had materialised and physical damage had occurred, would have been primarily liable to the third party suffering that damage. So to hold would be merely to extend the liability of a builder to compensate the owner for taking the remedial action which the builder would have been bound to take in discharge of the builder's duty to prevent or avoid physical damage if the builder had been in occupation of the building.

An action by the owner for damages in negligence against the builder for the cost of rectifying the defects is not, of course, a claim for indemnity by a concurrent tortfeasor (The order in *Voli v. Inglewood Shire Council* ([1963] 110 CLR at 101) apportioned liability equally between the Council and the architect): *ex hypothesi*, no physical damage has been suffered; no tort has been concurrently committed. However, the policy of the law is consistent with the sheeting home of loss to the negligent builder. Such an action is a remedy analogous to

the remedy available to a rescuer who protects a potential victim from damage threatened by the defendant's negligence (The position of Dr Cherry in *Chapman v. Hearse* [1961] 106 CLR 112; the police officer in *Haynes v. Harwood* [1934] 2 KB 240; or the station master in *Videan v. British Transport Commission* [1963] 2 QB 650). The duty which the builder breaches is, at base, a duty of the *Donoghue v. Stevenson* kind owed to prevent or avoid personal injury or damage to property, but the owner is within the area of contemplation as one who is at risk of suffering loss if the builder's duty of care to third parties is not discharged. I venture to suggest that the rescuer analogy may afford the "logical basis" which Lord Oliver found difficult to see (*Murphy v. Brentwood District Council* [1991] 1 AC at 488) for distinguishing dangerous from non-dangerous defects.

As the damage postulated in a case where the builder's duty to the owner is in question is neither personal injury nor property damage but actual economic loss, a remedy in tort is available only to a plaintiff who actually incurs expense by removing, paying for the removal or incurring a liability for the cost of removal of the defects which pose the substantial risk of physical damage to person or property. That was the position in the *Winnipeg* case where the "negligently supplied structure ... was not merely shoddy; it was dangerous" unreported, Supreme Court of Canada, 26 January 1995 at 9. It was the position to which Lord Denning referred in *Dutton v. Bognor Regis* and with which Lord Wilberforce was concerned in *Anns*. It was not the position in *Junior Books*. Nor is it the position in the present case. Here there is no evidence that the defects in 2 Wintercole Court pose any risk of danger to any person or to any property.

Decisions of American State Court

In some States of the United States, remote purchasers of a building have been allowed to recover damages against a negligent builder, but the basis of the remedy allowed is not uniform. In some instances, an action for negligence in circumstances similar to the *Winnipeg* case has been allowed (*Council of Co-owners v. Whiting-Turner* [1986] 517 A 2d 336); in other words, the Court has admitted claims for damages simply for latent defects that have become manifest, the remedy being either an action for negligence (*Cosmopolitan Homes, Inc. v. Weller* [1983] 663 P 2d 1041; *Oates v. Jag. Inc.* [1985] 333 SE 2d 222; *McMillan v. Brune-Harpenau-Torbeck Builders* [1983] 455 NE 2d 1276) or an action for breach of what is termed an "implied" warrant of fitness for habitability (*Barnes v. Mac Brown and Company, Inc.* [1976] 342 NE 2d 619; *Terlinde v. Neely* [1980] 271 SE 2d 768; *Richards v. Powercraft Homes, Inc.* [1984] 678 P 2d 427). In my respectful opinion, neither of these latter categories should be adopted into the law of this country. Our law does not imply a contractual warranty where there is no contract. Nor, generally speaking (see *Trident General Insurance Co. Ltd. v. McNiece Bros. Pty. Ltd.* [1988] 165 CLR 107), does our law impose a contractual obligation on a person who is not a party to the contract or a privy of a party. To admit a cause of action for economic loss resulting to a remote purchaser merely from the appearance of latent defects in a building would raise problems that are difficult to resolve in the light of other currently accepted principles of the law.

Proximity

This case was argued as though the existence of a duty of care owed by Mr Bryan to Mrs Maloney depended on whether there was a "relationship of proximity" between them. That approach follows the statement in the majority judgment in *Gala v. Preston* [1991] 172 CLR 243 at 252-253:

> that a relevant duty of care will arise under the common law of negligence only in a case where the requirement of a relationship of proximity between the plaintiff and the defendant has been satisfied ... The requirement of proximity constitutes the general determinant of the categories of case in which the common law of negligence recognizes the existence of a duty to take reasonable care to avoid a reasonably foreseeable and real risk of injury. In determining whether the requirement is satisfied in a particular category of case in a developing area of the law of negligence, the relevant factors will include policy considerations.

If the critical question is, as I would hold it to be, whether Mrs Maloney suffered damage compensable under the law of torts, I am respectfully unable to see how the question whether Mr Bryan owed Mrs Maloney a duty of care be resolved by reference to the notion of proximity in what has been called "its broader sense", *San Sebastian Pty. Ltd. v. The Minister* [1986] 162 CLR at 355, that is, embracing more than foreseeability. If Mrs Maloney suffered damage compensable in tort and if that damage consisted of pure economic loss, her entitlement to recover damages for negligence would require proof of some element further than mere foreseeability *Sutherland Shire Council v. Heyman* [1985] 157 CLR at 481. There is no error of principle involved in describing such a further element as a requirement of proximity but, as Lord Oliver observed in *Murphy v. Brentwood District Council* [1991] 1 AC at 487, proximity "is an expression which persistently defies definition". Unless proximity has an ascertainable meaning, it cannot provide a working criterion of liability *Leigh and Sillivan Ltd. v. Aliakmon Ltd.* [1985] QB at 395.

I have elsewhere stated my opinion that to treat proximity as a criterion of liability without an *a priori* definition of the elements it contains is to create a judicial discretion (*San Sebastian Pty. Ltd. v. The Minister* [1986] 162 CLR at 368; see also *Hawkins v. Clayton* [1988] 164 CLR at 555-556; *Gala v. Preston* [1991] 172 CLR at 260-263). If the elements be not defined, the question whether proximity exists in cases out of the mainstream can be answered confidently only by the judgment of a Court, perhaps involving "value judgments on matters of policy and degree" *Jaensch v. Coffey* [1984] 155 CLR 549 at 585. This was precisely the course followed by Lord Roskill in *Junior Books* in applying Lord Wilberforce's two-stage test [1983] 1 AC at 546-547. But the law of negligence should be capable of application in solicitors' offices. It should not have to await definition in litigation. Of course, when a Court decides that, in the particular circumstances of a case, the requirements of proximity were or were not satisfied and that a duty of care did or did not exist, the case can be a precedent for following cases that are not distinguishable from it, so that such cases will form a category and the requirements of proximity as defined in the precedent will serve as a determinant of the duty of care in that category of case. And when it is seen that there are many different categories of case in which different requirements of proximity have been defined, the existence of proximity can be said to have been a feature of all categories. In *Burnie Port Authority v. General Jones Pty. Ltd.* [1994] 179 CLR 520 at 543, Mason CJ, Deane, Dawson, Toohey and Gaudron JJ said of the requirement of proximity:

> As a general conception deduced from decided cases, its practical utility lies essentially in understanding and identifying the *categories* of case in which a duty of care arises under the common law of negligence rather than as a test for determining whether the circumstances of a particular case bring it within such a category, either established or developing.

If the only role for proximity in the broader sense were to provide an umbrella of terminology to cover the different requirements for the existence of different categories of duties of care (*Caparo Plc v. Dickman* [1990] 2 AC 605 at 617, 618; Barker, "*Are We up to Expectations? Solicitors, Beneficiaries and the Tort/Contract Divide*", [1994] 14 Oxford Journal of Legal Studies 137 at 147, and thereby assist in understanding and identifying them - in other words,

if the requirements of proximity were not invoked as a working criterion of liability in particular cases - it would have little practical significance. As Dawson J observed in *Gala v. Preston* [1991] 172 CLR at 276, the notion of proximity would not then afford any great help in deciding whether, in a case distinguishable from cases already decided, a duty of care exists. His Honour pointed out *ibid.* at 277 that:

> It is the identification of the underlying principle which is the important thing. Merely to describe it as a matter of proximity is to mask the problem.

Where a case falls within a category governed by a precedent, the category is necessarily constituted not by reference to the notion of proximity but by reference to the elements which it had been defined to include.

In his seminal judgment in *Jaensch v. Coffey* [1984] 155 CLR 549 at 585, Deane J referred to the "identification of the content of the criteria or rules which reflect that requirement" of proximity which in developing areas of the law should not be "divorced from the considerations of public policy which underlie and enlighten it". The requirement of proximity was seen to operate in that case by imposing "particular criteria which must be satisfied by a plaintiff before a duty of care in respect of a reasonably foreseeable injury in the form of nervous shock will be held to have arisen in her or his favour" *ibid*. at 592-593. In subsequent cases, however, the requirement of proximity has worn the appearance of a criterion of liability, rather than as the terminological description covering different working criteria of liability *Cook v. Cook* [1986] 162 CLR 376 at 381-382; *Gala v. Preston* [1991] 172 CLR at 252-254; *San Sebastian Pty. Ltd. v The Minister* [1986] 162 CLR a 355; *Hawkins v. Clayton* [1988] 164 CLR at 545, 576. In novel cases in which the question is whether a tortious duty of care should be expanded, the appropriate approach, in my respectful opinion, is to attempt to identify "the content of the criteria or rules" which might thereafter be applied in determining cases falling within the category then under consideration.

If proximity in the broader sense be invoked as a criterion of liability in particular cases without *a priori* definition of its content, the certainty which analysis of the different elements of tortious liability in different categories of case can produce will be lost (Thus in the present case Underwood J, noting "the emergence of a separate test of proximity additional to that of foreseeability, satisfaction of which will give rise to a duty of care not to expose the other party to the risk of economic loss alone", encountered the difficulty "that the content of, or test for ascertaining the requisite proximity is unclear". See *Christopher v. The Motor Vessel "Fiji Gas"* [1993] Aust Torts Rep 81-202 at 61, 964-61, 965), and the definition of elements which might constitute and distinguish a new category of case will give way to a mere evaluation of the circumstances favouring or not favouring recovery. Such a notion of proximity would be a juristic black hole into which particular criteria and rules would collapse and from which no illumination of principle would emerge.

Unless attention is focused on "the content of the criteria or rules which reflect (the) requirement" of proximity rather than on the amorphous notion of proximity as a general concept, the approach in *Anns* which this Court rejected in *Sutherland Shire Council v. Heyman* will be re-introduced. The question "is there a sufficient relationship of proximity (in the broader sense)?" will comprehend not only Lord Wilberforce's first test but also the policy question *Jaensch v. Coffey* [1984] 155 CLR at 585, 590; *Sutherland Shire Council v. Heyman* [1985] 157 CLR at 498; *Gala v. Preston* [1991] 172 CLR at 253; cf. *Cook v. Cook*

[1986] 162 CLR at 385-386. Lord Wilberforce's second test: are there "any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise?" will be included in the answer to the question: is there a sufficient relationship of proximity?

In the present case, I would address questions differently framed, namely, what damage did Mrs Maloney suffer? and, given foreseeability, was Mr Bryan under a duty to use reasonable care to prevent or avoid that kind of damage? The answer to the first question is: physical defects in the house which she bought are the only items of damage advanced in support of Mrs Maloney's claim and, as they posed no substantial risk of damage to person or to property, she suffered no damage in respect of which an action lies in negligence. The answer to the second question is: no.

I would therefore allow the appeal, set aside the judgments in the Courts below and in lieu thereof order that judgment be entered for the defendant.

Toohey J:

The issue in this appeal is whether the appellant, a builder, owed a duty of care to the respondent, a subsequent purchaser of a house built by the appellant, in respect of loss arising from the inadequacy of the footings in the construction of the house.

It is possible to identify the issue in this way because the findings of the trial Judge, Wright J, were not challenged. Thus the appellant accepted that he was negligent in failing to provide footings of sufficient depth; that the respondent suffered loss by reason of that negligence and consequent damage to the house in the form of cracks in the walls; that the measure of that loss was the decrease in the value of the house; and that the damage was reasonably foreseeable by the respondent.

Proximity

The weight of authority in this Court is that for an action to lie in negligence there must be a relationship of proximity between plaintiff and defendant. In *Burnie Port Authority v. General Jones Pty. Ltd.* [1994] 179 CLR 520 at 543, where the earlier decisions are noted, Mason CJ, Deane, Dawson, Toohey and Gaudron JJ said of proximity:

> As a general conception deduced from decided cases, its practical utility lies essentially in understanding and identifying the *categories* of case in which a duty of care arises under the common law of negligence rather than as a test for determining whether the circumstances of a particular case bring it within such a category, either established or developing.

The question whether the appellant is liable turns upon the degree of proximity between the negligent act (strictly speaking, the class of negligent act) relied upon by the respondent and the kind of damage sustained by her *Jaensch v. Coffey* [1984] 155 CLR 549 at 581-582; *Hawkins v. Clayton* [1988] 164 CLR 539 at 576. Gibbs CJ observed in *Sutherland Shire Council v. Heyman* [1985] 157 CLR 424 at 441:

> In deciding whether the necessary relationship exists, and the scope of the duty which it creates, it is necessary for the Court to examine closely all the circumstances that throw light on the nature of the relationship between the parties.

If the facts fall into a category which the authorities already recognise as attracting a duty of care then, as Gibbs CJ acknowledged *ibid*, this process will not be necessary. But in the present case the facts do not fall into a category which this Court, at any rate, has recognised as attracting a duty of care.

The type of loss suffered

One relevant circumstance is that the present case has been approached on the footing that the loss for which the respondent seeks to be compensated is pure economic loss. The appellant argued that any such loss was not recoverable by the respondent.

The qualifying adjective "pure" is used to distinguish financial loss which is not "causally consequent" upon physical injury to the plaintiff's own person or property from economic loss which is causally consequent upon such injury see *Feldthusen, Economic Negligence*, 2nd Edn. [1989] at 1. For example, in *Burnie* damages were awarded against the occupier of premises from which a fire spread to adjoining premises, destroying a quantity of frozen vegetables. Applying the classification, this loss was economic loss which was causally consequent upon physical injury to the plaintiff's property rather than pure economic loss.

The distinction has been the subject of criticism, not least by Sir Robin Cooke in the Law Quarterly Review Cooke, "*An Impossible Distinction*", [1991] 107 Law Quarterly Review 46. It is made all the more difficult to maintain because economic loss may take several forms. Mr Duncan Wallace QC has written at length on the subject of defective buildings. In one of his more recent contributions Duncan Wallace, "*Negligence and Defective Buildings: Confusion Confounded?"*, [1989] 105 Law Quarterly Review 46 at 57 he comments that "the presence of physical damage may be technically as well as legally entirely irrelevant to the existence of even the most serious physical defects in a building, or indeed of non-compliance with bye-laws". And he points out *ibid*. at 58 that in the case of inadequate foundations there may be, on the one hand, superficial cracking and settlement which ceases, requiring no more than superficial redecoration, and on the other hand, progressive deterioration which may require radical solutions, perhaps new foundations, in order to prevent structural failure.

In the present case the damages awarded by Wright J reflected the cost of underpinning the footings around the whole perimeter of the house and removing and replacing damaged brickwork. Wright J appears to have treated this cost as the measure of the decrease in the value of the house. In these circumstances, to describe the respondent as having suffered pure economic loss is debatable though it must be recognised that some of this cost was aimed at averting future damage. In *Anns v. Merton London Borough Council* [1978] AC 728 at 759 Lord Wilberforce described cracks in the walls and sloping of floors as a result of structural movements in a building as "material, physical damage" and the measure of damages as "the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying and possibly (depending on the circumstances) expenses arising from necessary displacement".

However, the respondent did not seek to argue against the classification and the Court was asked to dispose of the appeal on the footing that it was pure economic loss which she had sustained. It is therefore unnecessary to discuss the "complex structure" theory enunciated by Lord Bridge in *D. & F. Estates Ltd. v. Church Commissioners* [1989] AC 177 and later rejected by him in *Murphy v. Brentwood District Council* [1991] 1 AC 398 or to pursue further the viability of the traditional classification see generally Markesinis and Deakin, "*The Random Element of Their Lordships' Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from Anns to Murphy"*, [1992] 55 Modern Law Review 619. In the end the question is one of recoverability in particular circumstances, rather than the allocation of the circumstances to a particular classification.

Recovery for pure economic loss

There is no decision of this Court directly in point, where a purchaser of premises has sued the builder in respect of pure economic loss in the sense referred to earlier in this judgment. The area of the law relating to recovery of pure economic loss has been one of development, with the Courts conscious of the need to strike a balance between compensating an injured party for economic loss but at the same time confining liability within manageable limits. The law began by limiting liability to cases of physical loss or injury *Cattle v. Stockton Waterworks Co.* [1875] LR 10 QB 453. Later in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465 liability was extended to pure economic loss in an action for negligent misstatement. But reliance was at the heart of the decision in that case.

In England there were attempts to widen the scope of the action in negligence when physical injury was not involved. However, the high water mark reached in *Anns* was rejected in *D. & F. Estates Ltd.* and was not followed in *Murphy* or in *Department of the Environment v. T. Bates Ltd.* [1991] 1 AC 499. In *D. & F. Estates Ltd.* the lessees of a flat sought damages for the cost of remedying defective plaster work. The House of Lords held that the loss sustained by the lessees in renewing plaster work in the flat was pure economic loss and not recoverable in an action for negligence against the builders.

In *Murphy* the House of Lords reaffirmed the principle that economic loss could be recovered in negligence only where the plaintiff had sustained physical damage or where there had been reliance on the part of the plaintiff. Likewise, the present appellant contended that, in the absence of any special relationship between a subsequent purchaser and the builder and, in the absence of reliance by the purchaser on the builder, there was no sound reason for fixing him with a duty of care to prevent economic loss to a subsequent purchaser, in particular for fixing him with liability in the present case. The reference of reliance is an echo of the negligent misstatement which attracted liability in *Hedley Byrne*. "(T)he absence of reliance as a factor creates an additional difficulty in deciding whether a sufficient relationship of proximity exists to enable a plaintiff to recover economic loss" *San Sebastian Pty. Ltd. v. The Minister* [1986] 162 CLR 340 at 355.

In Australia, at least since *Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad"* [1976] 136 CLR 529 there has been a recognition (albeit in a different context) that it may be possible to recover economic loss where no physical damage is involved, even though there has been no reliance on the part of the plaintiff cf. *Opat v. National Mutual Life* [1992] 1 VR 283. However, the emphasis in the judgments in that case is on foreseeability that a particular person will be likely to suffer damages as a result of the negligence. Mason J said [1976] 136 CLR at 591. See also *Sutherland Shire Council* [1985] 157 CLR at 466, 493, 502:

> The problem is to yield compensation to the individual who suffers financial loss not necessarily consequential upon damage to his property when that loss is closely connected with the failure to take care and yet at the same time to deny compensation 'in an indeterminate amount ... to an indeterminate class', in particular, to a large class of persons whose loss arises because their use of a public utility or facility has been interrupted.

Stephen J thought that recovery for pure economic loss must depend upon "policy considerations" *ibid*. at 574. His Honour went on to say *ibid*. at 575:

> But in the general realm of negligent conduct it may be that no more specific proposition can be formulated than a need for insistence upon sufficient proximity between tortious act and compensable detriment. The articulation, through the cases, of circumstances which denote sufficient proximity will provide a body of precedent productive of the necessary certainty;

> the gradual accumulation of decided cases and the impact of evolving policy considerations will reflect 'the Courts' assessment of the demands of society for protection from the carelessness of others.

It will be necessary to consider such policy considerations as may be relevant but, first, it is helpful to see how the law has developed in some other jurisdictions.

Canadian and United States decisions

The position in Canada in reflected in the decision of its Supreme Court in *Canadian National Railway Co. v. Norsk Pacific Steamship Co. Ltd.* [1992] 91 DLR (4th) 289 where a majority (McLachlin J, with L'Heureux-Dube and Cory JJ concurring, and Stevenson J) held the defendants liable in negligence for economic loss. McLachlin J held pure economic loss to be *prima facie* recoverable when, in addition to negligence and foreseeable loss, there was sufficient proximity between the negligent act and the loss. Stevenson J held the defendants liable because they could reasonably foresee and actually foresaw that a specific individual, as distinct from a general class of persons, would suffer financial loss as a consequence of their conduct.

It is unnecessary to canvass the United States authorities. In any case the plenitude of jurisdictions makes such an exercise unprofitable. In *Canadian National Railway* McLachlin J classified the cases in the United States where damages have been awarded for economic loss as: those where the economic loss is closely related to physical damage; pollution cases where, on grounds of public policy, economic loss has been awarded to commercial fisherman and others; and certain products liability cases, at least where the defective product creates an unreasonable risk of harm to persons or property and such harm materialises *ibid*. at 362-363. I gladly accept McLachlin J's analysis and do not elaborate upon it. Its relevance, for present purposes, is to indicate that at least in some jurisdictions in the United States there is no absolute prohibition against the recovery of economic loss. However, many American decisions are concerned with warranty claims and do not provide direct assistance in the area with which this appeal is concerned. In any event, the problem remains of arriving at a legal formulation which will allow recovery of economic loss in appropriate cases while rejecting it in the case of loss which is too distant.

Definitive or incremental approach?

The dilemma is posed by McLachlin J by reference to the decision of the House of Lords in *Murphy*, where the search was for a definitive rule, and the decision of the Supreme Court of Canada in *City of Kamloops v. Nielsen* [1984] 10 DLR (4th) 641 where the Court was content to hold that, in the case in hand the action was one against the City by the purchaser of a house for the cost of repairs resulting from subsidence where the City, though aware through its building inspector of the defective foundations, failed to prevent the construction of the house, recovery for economic loss should be allowed. The former approach is likely to prove unavailing; the latter necessarily leads to some uncertainty in the evolving process. I respectfully agree with McLachlin J when she says [1992] 91 DLR (4th) at 367. See also *Sutherland Shire Council* [1985] 157 CLR at 481 per Brennan J.

> (T)he incremental approach of *Kamloops* is to be preferred to the insistence on the logical precision of *Murphy*. It is more consistent with the incremental character of the common law. It permits relief to be granted in new situation where it is merited. Finally, it is sensitive to damages of unlimited liability.

Nevertheless, acceptance of the incremental approach does not of itself provide an answer to the question of liability in the present case. Indeed the very term "incremental" invites inquiry because what is incremental is to an extent in the eye of the beholder. To answer the question, it is necessary to look more closely at the circumstances in which the appellant was held liable to the respondent.

Relevant circumstances

The appellant built a house for Mrs Manion in 1979. The respondent is the third owner of the house. Although some emphasis was placed by the appellant on his relative lack of experience as a builder, the trial Judge saying that he "was a comparatively inexperienced builder at the time", the fact is that he was a member of the Northern Tasmanian Master Builders Association. Mrs Manion was the appellant's sister-in-law but the house was built under what was accepted by the parties to this appeal as an ordinary commercial transaction. Importantly, there was no suggestion made by the appellant that he was to build other than in accordance with standard building practice; in that regard it may be noted that the contract was on a cost plus basis. The appellant accepted that he had to conform to the standard of a reasonably competent builder. In particular, it was not denied that he agreed to build a house with footings that were adequate. The fact that any inadequacy in the footings might not manifest itself for some years is significant because, in effect, the appellant was responsible for a structure, the defects of which might not readily be ascertained by a subsequent purchaser of the house.

If a subsequent purchaser of a house seeks to recover damages from the builder by reason of inadequacies in the building work, other considerations may intrude, such as the terms of the contract between the builder and the building owner, and the terms of the contract between building owner and purchaser. It may be important to determine, one day, the implications for liability had a building owner agreed that, as a cost saver, the house should be built in some respects that did not conform to accepted building practice. For instance he or she may have required the builder to build according to unusual specifications. The terms of the builder's contract are, to use Windeyer J's words in *Voli v. Inglewood Shire Council* [1963] 110 CLR 74 at 85, "not an irrelevant circumstance" in that they may help to determine the task upon which the builder entered. These matters are not directly material in the present case but they serve to identify the principles to be applied in determining the liability of the builder.

Since reference has been made to the contract between the appellant and Mrs Manion, it is as well to emphasise that the obligation on the appellant to exercise due care, skill and diligence in the building of the house arose not only in contract but in tort. The approach taken in *Voli* that the liability of an architect for failure to exercise due care, skill and diligence may arise either from a breach of contract or in tort and that liability to a third person may exist independently of the contract of employment applies equally in the case of a builder. Clearly, the existence of a contract between the appellant and Mrs Manion is of itself no barrier to an action in tort by the respondent based upon the failure to build according to reasonable standards *Central Trust Co. v. Rafuse* [1986] 31 DLR (4th) 481 at 522; *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd.* (unreported, Supreme Court of Canada, 26 January 1995), though the duty of care must not depend upon specific obligations arising from the express terms of contract *Hawkins v. Clayton* [1988] 164 CLR at 544 per Mason CJ and Wilson J; *Central Trust Co.* [1986] 31 DLR (4th) at 521-522.

Policy considerations

Whether the appellant is in law liable to the respondent must depend upon whether the necessary relationship of proximity exists, recognising however that there was no direct association between the parties. In this regard guidance may be had from the judgment of Thayer J of the Supreme Court of New Hampshire in *Lempke v. Dagenais* [1988] 547 A 2d 290. The case concerned an action by subsequent purchasers of property against the builder of a garage. The Court rejected the claim in negligence as involving economic loss but upheld the claim for breach of implied warranty of workmanlike quality. Thayer J identified as relevant the following policy considerations *ibid*. at 295: that latent defects will not manifest themselves for a considerable time, often after the property has been sold to an unsuspecting purchaser; that in a mobile society a builder must expect that the house will be sold within a relatively short time; that a subsequent purchaser has little opportunity to inspect and little experience and knowledge about construction; that the builder already owes a duty to the building owner to build in a workmanlike manner; and that confining recovery to the first purchaser might encourage sham first sales as a means of insulating builders from liability.

The considerations are equally applicable in the present case even though the action is one in negligence, not for breach of warranty. I would add to them the importance of a house to any buyer, something which is well recognised and would certainly be understood by a builder. Furthermore, there is a very direct relationship between the negligence of the appellant and the loss sustained by the respondent. It is only a matter of timing that the cracks in the wall appeared while the respondent was the owner rather than Mrs Manion.

This approach accords with the very recent decision of the Supreme Court of Canada in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd.* unreported, Supreme Court of Canada, 26 January 1995 where the builder of an apartment building was held liable to a subsequent owner of the land and building for the cost of replacing cladding that was defective. La Forest J, delivering the judgment of the Court, rejected the reasoning in *D. & F. Estates Ltd.*; held that the builder owed a concurrent contractual and tortious duty to the subsequent owner; was satisfied that the losses claimed satisfied the two-part test for recoverability of economic loss established in *Anns* and *Kamloops*; and concluded that there was a strong underlying policy justification for allowing recovery.

Two features of *Winnipeg Condominium* should be noted. The first is that the judgment emphasises that the duty in tort arises if there is a danger to the health and safety of the occupants which is foreseeable. However, in that respect the judgment emphasises the relationship between the negligent act and the damage sustained. Secondly, liability was imposed in a situation where the defect "poses a real and substantial danger to the inhabitants of the building". La Forest J said: "I do not find it necessary to consider whether contractors should also in principle be held to owe a duty to subsequent purchasers for the cost of repairing non-dangerous defects in buildings." In what significant respect the decision is distinguishable from the present case where the trial Judge, in referring to another decision of the Supreme Court of Tasmania, said:

> His Honour concluded that the water was a danger to inhabitants of a home unit unless repaired (a feature not necessarily established in the present case).

However, La Forest J made reference to several decisions, including that of the Full Court in the present case, where a more general duty owed by builders to subsequent purchasers was recognised. While his Honour was at pains to confine his remarks to dangerous defects, he referred with approval to the policy considerations identified in *Lempke*. In that sense the judgment is supportive of the conclusion reached by the Full Court in the present case.

Conclusion

The various considerations to which reference has been made give rise to sufficient proximity between the parties to render the appellant liable to the respondent. That conclusion is based on the findings of the trial Judge mentioned earlier. It relates to the building of a house that is a non-commercial building. It is uncomplicated by anything arising from the contract between the appellant and Mrs Manion. It is also uncomplicated by any question of when the cause of action vested in the respondent or any issue of limitation of actions arising therefrom. The appellant does not rely upon these considerations as an answer to the respondent's claim. The view of the trial Judge was that no further cause of action would vest in owners following the respondent because, at the time of purchase, a reasonable examination would disclose the defect in the footings. While this seems an appropriate approach, it is unnecessary to express any concluded view on this aspect.

One thing to be said, particularly in the area of non-dangerous defects, is that as time goes on it may be more difficult to show that the defect was the result of negligence and not of wear and tear or factors not associated with the standard of construction. Another is that clearly there is a range of situations, including liability for defective products, with which this judgment does not purport to deal.

It follows from what has been said that the appeal should be dismissed.